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311.A. 34
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NO. 74-238
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Walter P. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the circuit court of
	)	Madison County, Illinois.
Plaintiff-Appellee,)	
)	
vs.)	
)	
CARL DARNELL NELSON,)	
	)	Honorable John Gitchoff,
Defendant-Appellant.	)	Judge Presiding.

MR. PRESIDING JUSTICE JONES delivered the opinion of the court:

The defendant-appellant, Carl Darnell Nelson, was convicted by a jury of the murder of Derome Tyus. The court sentenced the defendant to a term of fourteen to twenty-six years in the penitentiary. On appeal the sole issue presented is whether the accused was proven guilty beyond a reasonable doubt.

The defendant was indicted for the alleged offense with co-defendants Roosevelt Nelson, Rozelle Williams and Quintin Dale Porter. Rozelle Williams pled guilty to the offense in a separate proceeding. Quintin Dale Porter was tried separately before a judge and found guilty of the offense charged. On appeal, this court affirmed his conviction. (People v. Porter, Fifth District, No. 74-220, filed May 2, 1975.) Roosevelt Nelson was given immunity from prosecution.

Defense counsel and the State's Attorney stipulated that Derome Tyus was dead and that his death was caused by two gunshot wounds to the back of his head. His body was discovered by police on the river-front in Venice, Illinois. It was undisputed that Rozelle Williams shot the victim to death on the day in question.

The witnesses at trial were in substantial agreement regarding most relevant facts. Late on the evening of November 4, 1973, the defendant arrived at Garrett's Tavern in West Madison, Illinois. He had a gun. At about 1:00 a.m. on the morning of November 5, 1973, an argument developed between Tyus and the defendant outside the tavern. In the course of this altercation a gunshot was heard. Tyus ran from the

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area on foot. The defendant, Rozelle Williams, Roosevelt Nelson, and Quintin Porter left the tavern together in Porter's car. Porter did the driving, Roosevelt Nelson sat in the front passenger seat, and Williams and the defendant sat in the back seat.

After riding to the top of a nearby hill, Williams and the defendant saw Tyus run into a yard on Weaver Street. The two got out of Porter's car. Williams remained in the front yard. The defendant went into the backyard. Soon thereafter, Williams saw the defendant and Tyus walking back toward the car. Williams remembered that there was no sign of a fight between the defendant and the deceased as they approached the car. The defendant testified that when he walked into the yard Tyus was lying on the ground complaining that he had hurt his leg. He told the victim to get up, and they walked back to the car.

Williams directed Porter to drive the car to the riverfront. Porter drove the car to a levee area in Venice, Illinois, where Williams, Tyus, and the defendant got out of the car. The three men walked a few feet behind the car. Tyus was shot twice by Williams a few minutes later. Immediately after the shooting, Williams and the defendant got back into the car. The four men drove away. Nothing was said about the events that had just occurred.

The testimony of the witnesses is conflicting in a few respects. Co-offender Williams recalled hearing one or two gunshots come from the backyard of the house on Weaver Street. The defendant denied having heard or having fired a gun at that time. On cross-examination Williams testified that as the three men got into the back seat of the car, he saw a gun in the defendant's possession. The defendant testified that he had earlier placed the gun on the seat of the car.

Williams testified that after arriving at the riverfront, the defendant and Tyus started arguing. He related that the defendant swung at Tyus, and Tyus got to his knees on the ground. The defendant, however, testified that Williams ordered Tyus out of the car and told him to get on his knees. Williams stated that the defendant was holding the gun at his side when he (Williams) snatched it from him. Williams pointed the gun at Tyus and pulled the trigger, but the gun misfired. The witness said that the defendant asked him to "stop or slow down." In response to repeated questioning by the prosecutor, Williams stated that

he had heard the defendant say, "I'll pop him and then you pop him." The defendant, however, denied having made that statement and testified that he had yelled at Williams, "Stop, don't shoot." The defendant denied having ever discussed harming or killing Derome Tyus with Williams. He also denied having ever fired a gun on November 5, 1973.

The defendant was accused of being a principal to the offense of murder pursuant to the doctrine of accountability. Ill.Rev.Stat., ch. 38, sec. 5-2, provides in pertinent part:

"A person is legally accountable for the conduct of another when:
* * *

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

An element of section 5-2(c) is that the defendant must act with the intent to promote or facilitate the commission of an offense. The defendant contends that he was not proven guilty beyond a reasonable doubt because the evidence does not establish that he possessed the intent to promote or facilitate the offense of murder. He contends further that he should not have been held accountable for the actions of Rozelle Williams.

The requisite mental state for a crime may be proved by the acts and circumstances surrounding the defendant's conduct. (People v. Barrington, 15 Ill.App.3d 445, 304 N.E.2d 525.) The question of intent is one of fact for the trier of fact. (People v. Chambers, 15 Ill. App.3d 23, 303 N.E.2d 24.) While mere presence at the scene of a crime does not render a person a principal of the crime, it is well established that one may aid and abet without actively participating in an overt act. (People v. Nugara, 39 Ill.2d 482, 236 N.E.2d 693.) The fact that the criminal acts were not committed pursuant to a preconceived plan is not a defense if the evidence indicates involvement on the part of the accused in the spontaneous acts of the group. (People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478.) If the proof shows that the accused was present at the scene of the crime and did not disapprove or oppose it, the trier of fact may competently consider that conduct in connection with other circumstances and thereby reach the conclusion that the accused assented to the commission of the criminal act, lent to it his countenance and approval, and was thereby aiding and abetting the

crime. People v. Murphy, 17 Ill.App.3d 482, 308 N.E.2d 235; People v. Bracken, 68 Ill.App.2d 466, 216 N.E.2d 176.

The evidence introduced at trial reveals that the defendant was more than a passive observer at the scene of the crime. From the testimony of co-offender Williams it can be inferred that the defendant forced the victim to come back to Porter's car. The defendant sat in the back seat with Tyus until the car reached a remote area. The accused had a gun. He got out of the car, and, according to Williams, knocked the deceased to his knees. Williams snatched the gun away from the defendant, aimed it at Tyus and pulled the trigger. The gun misfired. The defendant then went with Williams under a streetlight to determine why the gun had misfired. He remained outside the car with Williams until Williams had shot Derome Tyus twice in the head. Finally, the accused returned to the car with Williams and the four drove away. Although the foregoing evidence regarding the deceased's abduction on the hill and his death on the levee was in a few respects conflicting, we find that the facts and circumstances surrounding the defendant's conduct are such that the jury was justified in finding that the defendant possessed the intent to promote or facilitate the crime committed. The proof also supports the finding that the defendant aided and abetted Rozelle Williams in the commission of the murder and was thus accountable for his actions.

For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

Affirmed.

CONCUR:

KARNS, J. and CARTER, J.

PUBLISH ABSTRACT ONLY.



61568

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 JIMMIE McLENTON,)
)
 Defendant-Appellant.)

APPEAL FROM CIRCUIT
 COURT OF COOK COUNTY.

HONORABLE
 JACK ARNOLD WELFELD,
 PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, J., LORENZ, J., AND SULLIVAN, J.

Defendant was found guilty after a bench trial of two charges of contributing to the sexual delinquency of a child (Ill. Rev. Stat. 1973, ch. 38, par. 11-5). He was sentenced to a term of six months in the House of Correction on each charge, the sentences to run concurrently.

Defendant wished to appeal, and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition also has been filed. The brief states that the only possible issues which could be raised on appeal are (1) that the statute under which defendant was convicted is unconstitutionally vague, (2) that the complaint was insufficient to charge defendant with the offense, (3) that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt, (4) that the defendant did not knowingly and understandingly waive his right to a trial by jury, and (5) that the trial court erred in allowing corroborating hearsay testimony into evidence. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Copies of the motion and brief were mailed to defendant on April 24, 1975. He was informed that he had until July 1, 1975, to file any additional points he might choose in support of his appeal. Defendant has responded.

At trial Marie Culver, age 10, testified that on the evening of December 25, 1974, she and Emma May Jordan were listening to records in defendant's first floor apartment at 4647 North Kenmore, Chicago, Illinois, with defendant and his wife. Defendant asked the girls if they would like to walk to the store with him, and they replied in the affirmative. When they got into the hallway of the building, defendant grabbed both girls by the hair, produced a knife and threatened to stab them if they did not follow his orders. Defendant forced both girls into a second floor apartment where he ordered them to take off all of their clothing. The girls complied. Defendant struck Emma May in the face, rendering her unconscious. He ordered Marie to sit in a chair. Defendant then threw Emma May on the bed, took off his clothing and got on top of her. At that time Emma May's sister knocked on the door. Defendant quickly put his clothes on and opened the door.

Emma May Jordan, age 14, testified that on the evening of December 25, 1974, she and Marie Culver were listening to records in defendant's apartment with defendant and his wife. At approximately 10:30 P.M. defendant asked the two girls to go to the store with him, and they agreed. In the hallway of the building defendant grabbed both girls by the hair, threatened them with a knife and forced them into a second floor apartment. Defendant then ordered both girls to remove all of their clothing, and they complied. Emma May testified that defendant then hit her in the lip and knocked her unconscious. She stated that when she regained consciousness, her sister and the police were present.

Marvella Culver, the mother of Marie Culver, and Essie Jordan, the mother of Emma May Jordan, both testified that they had a conversation with their daughters regarding what had occurred on December 25, 1974. At that time both girls stated that defendant had threatened them with a knife and forced them to remove all of their clothing. Thereafter defendant struck Emma May and knocked her unconscious.

Prinnie Jordan, the sister of Emma May Jordan, testified that on the evening of December 25, 1974, she was in the apartment building in which defendant lived, looking for her sister. She found her sister and Marie Culver in a second floor apartment with defendant. Both her sister and Marie were completely nude. Her sister was lying on a bed. Defendant was fully clothed. At that time Marie stated that defendant had knocked Emma May out and had gotten on top of her.

William Humphrey, a Chicago police officer, testified that on December 25, 1974, he was on patrol when he was stopped by Prinnie Jordan and several other girls. Thereafter they proceeded back to 4647 North Kenmore in an attempt to locate defendant. He was found in the apartment of a friend and was placed under arrest.

Defendant and Josette McLenton, his common law wife, both testified that on December 25, 1974, Emma May Jordan and Marie Culver came to their apartment. Thereafter defendant left the apartment and went to visit a friend down the hall. Defendant did not return until after both girls had left.

The first possible argument which could be raised on appeal is that the statute defining the offense of contributing to the sexual delinquency of a child is unconstitutionally vague in that it does not give a defendant proper notice of the nature of the charge which he is alleged to have committed. A criminal statute violates the constitutional requirement of definiteness when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. (People v. Ross, 41 Ill.2d 445, 244 N.E.2d 608.) A careful reading of the Statute involved here demonstrates that it does not fall within this classification. The statute is sufficiently definite so that it gives an ordinary person fair notice of what is forbidden. See People v. Polk, 10 Ill. App.3d 408, 294 N.E.2d 113.

The second possible argument which could be raised on appeal is that the complaints were insufficient to charge defendant with the crime of contributing to the sexual delinquency of a minor in that the complaints used the statutory term "lewd fondling." Here the complaints charge that defendant contributed to the sexual delinquency of Emma May Jordan in that he performed an act of lewd fondling upon her, and that he contributed to the sexual delinquency of Marie Culver in that he performed an act of lewd fondling in her presence. Complaints similar to that in the case at bar have been held to be sufficient. People v. Keegan, 52 Ill.2d 147, 286 N.E.2d 345.

The third possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. In reviewing a conviction for the offense of contributing to the sexual delinquency of a child, a reviewing court is charged with a special duty to exercise the utmost caution and circumspection in scrutinizing the sum and substance of the evidence upon which the conviction is predicated. (People v. Pointer, 6 Ill. App.3d 113, 285 N.E.2d 171.) However, in examining such a charge reviewing courts may not encroach upon the function of the trier of fact to determine the credibility of the witnesses and otherwise assess the evidence presented at trial. (People v. Springs, 51 Ill.2d 418, 283 N.E.2d 225.) The testimony of the complaining witness alone is sufficient to sustain a conviction even if denied and not corroborated. People v. Halteman, 10 Ill.2d 74, 139 N.E.2d 286.

In the case at bar the testimony of Emma May Jordan and Marie Culver was clear, convincing and if believed by the trial court, as it obviously was, sufficient to establish defendant's guilt beyond a reasonable doubt. In addition, their testimony was corroborated by that of Emma May's sister who stated that she

entered the room and found both girls completely without clothing in defendant's presence.

The fourth possible issue which could be raised on appeal is that defendant did not knowingly and understandingly waive his right to a trial by jury. There is no precise formula for determining whether defendant's waiver of the right to a trial by jury is knowingly and understandingly entered. (People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453.) Each case depends upon the particular facts and circumstances of that case. People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708.

In the case at bar the trial judge personally addressed defendant with defense counsel present and asked if defendant understood what a jury trial entailed. Defendant replied that he did. Thereafter the trial judge asked if defendant wished to be tried by a jury, and defendant replied in the negative. The trial then proceeded without further discussion. This colloquy was sufficient to demonstrate that defendant knowingly and understandingly waived his right to a trial by jury. See People v. Johnson, 3 Ill. App.3d 158, 279 N.E.2d 47.

The fifth possible argument which could be raised on appeal is that the corroborating hearsay testimony of several witnesses was improper. The substance of a complaint made by a victim to a sexual offense is admissible only in rape cases, and the rule does not apply to a case of contributing to the sexual delinquency of a child. (People v. Smith, 55 Ill. App.2d 480, 204 N.E.2d 577; People v. DeMoon, 16 Ill. App.3d 510, 306 N.E.2d 618.) However, the rule is well established that timely objections to hearsay testimony must be made at trial and cannot be raised for the first time on appeal. (People v. Riles, 10 Ill. App.3d 772, 295 N.E.2d 234.) Here the hearsay testimony was not objected to at trial and, therefore, cannot be alleged as error on appeal.

Defendant in his response to this court has asked for the appointment of different counsel. However, he does not state any facts or basis for his request.

We have examined the record and concur in the opinion of the Public Defender that the arguments raised do not have substantial merit. Our inspection of the record does not disclose additional grounds for an appeal which are not frivolous. We, therefore, allow the petition of the Public Defender to withdraw as counsel on appeal for defendant and affirm the judgment entered below.

AFFIRMED.

Abstract only.

No. 74-89, 74-319

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

311.A. 49

FILED
AUG 4 - 1975
FIFTH DISTRICT
CLERK APPEALS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the circuit court
	)	of Randolph County, Illinois.
Plaintiff-Appellee,)	
)	
vs.)	
)	
CHARLES WHITSON and HERBERT)	
TURSTON,)	
	)	Honorable Francis Maxwell,
Defendants-Appellants.	)	Judge Presiding.

MR. PRESIDING JUSTICE JONES delivered the opinion of the court:

This is a consolidated appeal from the convictions of Charles Whitson and Herbert Turston for the offenses of deviate sexual assault and aggravated battery. Whitson, Turston, Anthony Williams, and Decada Nixon were charged in a three count indictment with deviate sexual assault, aggravated battery, and battery of Stephen D. Boland on June 24, 1973. The cases against Williams and Nixon were disposed of separately. Whitson and Turston went to trial before a jury and were found guilty on all three counts. Both Whitson and Turston were sentenced to concurrent terms of two to six years for the aggravated battery conviction and four to six years for the deviate sexual assault conviction. No sentence was imposed for the battery conviction, as the court found it to be a lesser included offense of the aggravated battery conviction.

Several issues are raised in this appeal, including whether each defendant was proved guilty beyond a reasonable doubt, whether Whitson's right of confrontation was violated by the admission of certain hearsay testimony, and whether the State's Attorney made an improper and prejudicial closing argument with respect to each defendant.

Whitson, Turston, Williams, Nixon and the victim of the alleged offenses, Stephen D. Boland, were all inmates of Menard Penitentiary on June 24, 1973. Each was assigned to various duties with respect to prison related facilities which are located immediately outside of the penitentiary itself. It is in or near two of these facilities,

a greenhouse and a "24-hour shack," that the offenses are alleged to have occurred.

The first witness to testify at the trial was Decada Nixon, whose testimony can be summarized as follows. He had been assigned to work on the lawn in front of the penitentiary, and at about 8:30 a.m. on June 24, 1973 he went outside the prison to a greenhouse where he found Whitson, Turston, and Williams drinking homemade whiskey. After a while Whitson brought up the subject of Stephen Boland and suggested that they have intercourse with him. About fifteen or twenty minutes later Boland came in and Whitson stated that they wanted to talk to him. Boland agreed to do so and proceeded to walk to the "24-hour shack" where he had been headed anyway to watch television. Whitson and the others followed Boland to the shack where Boland, apparently sensing "something was up," attempted to leave the shack. At that point Whitson grabbed Boland around the waist, but Boland managed to get loose. Then Nixon grabbed Boland by the arm and Boland again got loose. Then Williams picked up Boland and carried him into the shack. They all sat and Whitson told Boland that they wanted him to drink with them. When Boland responded that he did not want to drink, either Whitson or Williams told him that if he did not do so they would have intercourse with him. Boland then drank two cups of the whiskey, after which Whitson told Boland that he was going to "do the sex thing." When Boland stated he did not want to, Whitson grabbed a pipe with which he hit Boland about eleven times. As a result Boland's head began to bleed. With the idea of effecting an escape for Boland, Nixon grabbed a stapler to hit either Whitson, Turston, or Williams. Instead Nixon hit Boland. During all of this Turston either had his arm around Boland's waist or sat nearby and "then when he (Whitson) was beating him, then Turston would rap to him to go ahead and do this." Nixon tried to leave but Williams said "nobody was going nowhere." However, when they saw that Boland was bleeding they all went outside and Williams got some water and a rag for Boland to wash his face. Turston and Nixon began to argue and as a result, Turston went into the greenhouse and got a knife which he pulled on Nixon. Afterwards, however, Nixon left the group. Nixon did not report the incident to the prison officials because he "was scared." During

the time he was with the group Nixon did not see any guards or officers come by; he also did not see anyone commit a deviate sexual act; however, when he left Boland was still with the others. Later, after Boland had apparently reported the incident, Whitson, Turston, Williams, and Nixon were placed in "segregation." During the "segregation" Nixon and Turston had a conversation in which Turston stated that Nixon should say nothing but that he and Whitson did have anal intercourse with Boland.

Immediately after Nixon made the statement about this conversation with Turston, defense counsel for Whitson made a motion for a mistrial based on the statement. Defense counsel argued that the effect of the statement could not be corrected by a mere admonishment. The motion was denied but the court instructed the jurors that they should disregard the statement and not consider it as evidence.

Stephen Boland was next to testify. Because defendants in this appeal assert that Boland's testimony significantly contradicts Nixon's testimony we will summarize the entirety of Boland's testimony also, as follows. One June 24, 1973 Boland checked out of the penitentiary in order to pursue his work assignment taking care of flowers around the greenhouse. After a short fishing trip across the river he came back to the greenhouse and therein saw Whitson, Turston, Nixon and Williams drinking. Boland went through the greenhouse and into the "24-hour shack." Immediately after he sat down to watch television, the other four individuals came into the shack. Whitson accused Boland of being a homosexual and stated that he wanted to commit a sexual act with Boland. Whitson began pushing Boland and then got a pipe which he "[s]tarted swinging like he was crazy" and hit Boland numerous times all over his body. Turston was sitting in the chair and Williams was "standing there" while Whitson beat Boland. Nixon then hit him with a stapler. As a result of the blows, Boland felt "hazy" and his head and face were bleeding. Williams got some water and a rag and Boland washed his face. It was time for the "count man" to come by, so they all went outside in order to be counted present. The "count man" drove by in a truck about fifty feet from where they stood. Boland did not say anything or try to break away, because Williams, who weighs about two hundred and fifty pounds, stood next to him threatening him. After the "count man" had gone by Nixon and Turston began to argue.

Consequently Turston went into the greenhouse and got a knife and then Nixon armed himself with a rock. Eventually Nixon was able to get away. The remaining four men went back into the shack and Whitson again beat Boland with the pipe. During the second beating Turston was "either outside or around there someplace." Turston then forced anal intercourse on Boland and thereafter Whitson did the same. Whitson, Turston and Williams then took Boland to an auto repair garage where he was allowed to shower. Turston and Williams then took Boland behind some automobiles where Turston forced intercourse on Boland again while Williams threatened with a pipe wrench. They then went back to the "24-hour shack" for the count. Shortly after the "count man" had come by and looked in, Boland was allowed to leave. He went down to the shower where he saw the "count man" and ran to him. Boland was taken to the hospital; however, he did not see a doctor until either the next day or two days later. Boland reported the incident to a Mr. Gentsch, the administrative assistant to the warden, and to a Mr. Gerulis, a guard, on the date of the incident. The next day he reported the incident to Mr. Sympson, the warden, and to a guard nicknamed "Coon Dog."

The next witness to testify was Dr. Donald S. Wham, the prison physician, who stated that he had examined Boland on the day after the alleged incident. Dr. Wham stated that Boland had reported to him that he had been beaten by three other inmates and sexually assaulted by two of the three. He examined Boland and found swelling, abrasions, and contusions all over his body. He examined the anal area and found it tender to the touch, although he did not detect discoloration, laceration, or bleeding. Dr. Wham also stated that he conducted a microscopic test of the anal mucus to discover whether any sperm was present. The test did not show the presence of sperm; however, Dr. Wham stated that the test was inconclusive since he understood that Boland had had a bowel movement between the time of the alleged attack and the time of the test.

Several other witnesses also testified, including Mr. Himming-hoeffer (the "count man"), Mr. Gentsch, Mr. Gerulis, Mr. Sympson, and defendant Whitson. We do not find it necessary to make a lengthy summary of all of their testimony here. However, we should point out

that Whitson, in his testimony, denied seeing either Boland, Turston, Nixon, or Williams on June 24, 1973 and denied having gone to the greenhouse area on that day. Whitson explained that he had remained all day at the warden's house, where he had duties as a "houseboy." He also stated that Mrs. Sympton called him to do the dishes after the noon meal. We should also point out that Gerulis testified on direct examination that on the evening of June 24, 1973 Boland had reported the alleged incident to him but that Boland accused only Turston, Williams and Nixon. However, on cross examination Gerulis admitted that in his written report made that same evening he stated that Boland had accused Turston, Williams, Nixon, and Whitson. Gerulis explained that he made a mistake in wording the report that way, because Whitson had been accused by a "greenhouse man" rather than by Boland. Turston, Nixon, and Williams were greenhouse men whereas Whitson and Boland were not.

The first contention on this appeal is that defendant Turston was not proved beyond a reasonable doubt to be guilty of either aggravated battery or deviate sexual assault. As to the aggravated battery, defendant Turston asserts that the State attempted to prove his guilt of the offense by means of accountability principles but that the facts show no more than defendant Turston's mere presence during the aggravated battery. Defendant Turston cites People v. Shields, 6 Ill.2d 200, 127 N.E.2d 440, and other cases, for the principle that mere presence during the commission of an alleged offense, without any affirmative act of assisting, abetting, or encouraging the commission of the act is not sufficient to make one a principal in the commission of the offense.

While it is well established that mere presence at the scene of a crime is not sufficient to constitute a person accountable for a crime, it is equally well established that one may aid and abet without actively participating in an overt act. (People v. Nugara, 39 Ill.2d 482, 236 N.E.2d 693; People v. Dickens, 19 Ill.App.3d 419, 311 N.E.2d 705, In Dickens this court pointed out:

"Evidence that tends to establish that a person was present during the commission of a crime without disapproving or opposing it may be considered by the trier of fact, with other circumstances, in reaching its conclusion that such person assented to the commission of the crime, lent it his countenance and

approval and thereby aided and abetted the commission of the crime. [citation] When a group shares a 'common design' to do an unlawful act and all assent, whatever is done in furtherance of that design is considered the act of all of them." [citations] 311 N.E.2d at 707.

In the instant case, Turston went into the "24-hour shack" with the knowledge that Boland was to be made the sex object of one or more members of the group. When Boland was beaten after he had expressed his refusal, Turston either sat nearby or restrained Boland or voiced his encouragement. After Boland was beaten a second time, Turston forced anal intercourse on Boland and then did the same again later. It is clear that the "common design" of Whitson, Turston, Nixon, and Williams was to make Boland a sex object. In furtherance of that purpose the unwilling Boland was beaten with a pipe. Furthermore, Turston was the first to force intercourse on Boland after the beatings. Under these circumstances we cannot say that Turston was merely present. The facts show him sufficiently accountable to be charged as a principal to the aggravated battery.

Defendant Turston further asserts, however, that as to both the aggravated battery and the deviate sexual assault charges the testimony of the State's witnesses was improbable and inconsistent and raises serious doubts as to the defendant's guilt. Defendant cites People v. Smith, 3 Ill.App.3d 64, 278 N.E.2d 551, for the principle that this court should reverse a judgment of guilty, even where the credibility of witnesses is the primary issue, where an examination of the evidence shows the evidence to be insufficient to establish the defendant's guilt beyond a reasonable doubt.

We do not feel the evidence is insufficient to prove beyond a reasonable doubt Turston's guilt of aggravated battery and deviate sexual assault. As to the aggravated battery, the testimony of both Stephen Boland and Decada Nixon amply describe the beating of Boland and the circumstances of Turston's presence as discussed above. Furthermore, Dr. Wham, the prison physician, testified to the swollen and bruised condition in which his examination found Boland to be on the day after the alleged incident and to the fact that during the examination Boland had stated that three inmates had beaten him. Finally, A.C. Gerulis, a prison guard, testified that a short while after the alleged incident, Boland, who was "mighty scared," "beat up," and "reluctant" to talk about the incident, implicated Turston

in the beating.

As to the deviate sexual assault, the testimony of Boland sufficiently describes two attacks by Turston, the first in the "24-hour shack" shortly after Nixon departed from the group and the second in the garage after Boland had been allowed to shower. Furthermore, Nixon testified as to the intent of the group to sexually assault Boland, as to the beating of Boland to force him to submit, and as to Turston's encouragement to Boland to "go ahead and do this." Although Nixon testified that he did not witness a sexual assault of Boland, Boland was still held by the group when Nixon left. Finally Dr. Wham testified that on the day after the alleged incident Boland stated that he had been sexually assaulted by two inmates. Dr. Wham further testified that his examination of Boland's anal area showed it to be tender to the touch and, although no sperm was detected in Boland's anus, the absence of sperm could not be conclusive.

Although defendant has pointed to discrepancies in the testimony of the various witnesses, such as whether Boland walked into the shack or was carried into it, the discrepancies are of a minor nature. Discrepancies and inconsistencies in the testimony of the State's witnesses were properly a matter to be considered by the jury in their determinations, and slight testimonial discrepancies do not render testimony unworthy of belief as a matter of law. (People v. Jordan, 38 Ill.2d 83, 230 N.E.2d 161; People v. Kriston, 11 Ill.App.3d 1077, 297 N.E.2d 211.) In light of all of the testimony mentioned above we feel that Turston was sufficiently proved guilty beyond a reasonable doubt of both aggravated battery and deviate sexual assault.

The next contention of this appeal is that defendant Whitson was not proved beyond a reasonable doubt to be guilty of aggravated battery or deviate sexual assault. Although the proof of Whitson's guilt of aggravated battery rested upon accountability principles, the evidence against Whitson on both offenses has necessarily been mentioned above in discussing the evidence against Turston and need not, therefore, be further summarized here. There are, however, three differences which we need consider with respect to this issue. First, Whitson, unlike Turston, testified in his own defense and denied any participation in either offense. Second, as mentioned above, A.C. Gerulis

testified that although in his written report of the incident he had stated that Boland had accused Turston, Nixon, Williams, and Whitson, he was mistaken in wording the report that way, since Whitson's name had been received from a "greenhouse man" instead of from Boland. Third, Boland on cross examination stated that he had a good deal of hostility toward Whitson even prior to June 24, 1973, because Whitson had accused him of homosexual activity.

All three of these factors go to the matter of the credibility of the witnesses and were properly for the consideration of the jury. (People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709.) To begin with, the hostility of a witness can be shown as a means of impeaching the witness' credibility. (People v. Rainford, 58 Ill.App.2d 312, 208 N.E.2d 314. In the instant case Boland's hostility toward Whitson was sufficiently explored on cross examination. Once the hostility was shown it was for the jury to determine whether or not to believe the testimony of Boland in light of that hostility.

Similarly it was for the jury to determine whether or not to believe the statement made by Gerulis that Boland had accused only Turston, Williams, and Nixon, in light of the prior inconsistent statement made by Gerulis in his written report. Gerulis was given ample opportunity to explain the inconsistency. The jury could believe as much or as little of Gerulis' testimony as they pleased. People v. Smith, 7 Ill.App.3d 912, 288 N.E.2d 901.

The testimony of defendant Whitson consisted basically of a denial of any association with Turston, Nixon, Williams, or Boland, a denial of any entry into the greenhouse or the "24-hour shack" on June 24, 1973, and an explanation that he had spent the entire day at Warden Sympson's cottage which, according to Whitson, could be considered as "right across the street" from the greenhouse. Warden Sympson testified that he saw Whitson at the cottage during the night of June 24, 1973 but he had no knowledge of Whitson's whereabouts during the daylight hours of that day. Mr. Himminghoffer, the "count man," stated on direct examination that to the best of his knowledge Whitson made the count at the warden's house at 2:45 p.m. and 5:20 p.m. However, on cross examination, Mr. Himminghoffer noted that the warden's house is only about twenty-five yards from the greenhouse, that no

written record was kept of the counts, and that he was "fuzzy" as to where Whitson was during the counts on June 24, 1973. Mr. Himminger explained that Whitson usually made the count at the warden's house. Thus the only witness who was positive that defendant Whitson was at the warden's house during the afternoon of June 24, 1973 was Whitson himself.

In contrast to this, both Boland and Nixon gave positive testimony, as to Whitson's participation in the incident at the greenhouse and the "24-hour shack."

Conflicting testimony does not in and of itself establish a reasonable doubt of a defendant's guilt. (People v. Clanton, 16 Ill. App.3d 593, 306 N.E.2d 486.) And the triers of fact are not required to search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt in order to find the accused not guilty. (People v. Puckett, 6 Ill.App.3d 206, 285 N.E.2d 258.) The testimony of even a single witness, if it is positive and the witness credible, is sufficient to convict, notwithstanding the fact that the testimony is contradicted by the accused. (People v. Sullivan, 46 Ill.2d 399, 263 N.E.2d 38; People v. Morehead, 45 Ill.2d 326, 259 N.E.2d 8, cert. den., 400 U.S. 945, 91 S.Ct. 251, 27 L.Ed.2d 251.) In the instant case, the jury heard positive testimony of more than one witness concerning defendant Whitson's guilt of aggravated battery and of at least one witness, Boland, concerning Whitson's guilt of deviate sexual assault. We cannot say that as a matter of law their testimony was so unworthy of belief that the jury could not find Whitson guilty of both offenses beyond a reasonable doubt.

The next contention on this appeal is that the deviate sexual assault conviction of defendant Whitson should be reversed because of the statement made at the trial by Decada Nixon as to the out of court statement allegedly made by Turston to Nixon after they had been put in segregation. As mentioned above, Nixon testified that on June 25, 1973, after he, Turston, Williams, and Whitson, had been placed in segregation as a result of the alleged incident, Turston told Nixon that he and Whitson did have intercourse with Boland after Nixon had left the group on June 24, 1973. As soon as Nixon made this statement

at the trial Whitson's attorney made a motion for a mistrial arguing that the effect of the statement could not be corrected by an instruction to the jury. After a discussion of the matter out of the presence of the jury, the court instructed the jury to disregard the statement made by Nixon and not to consider it as evidence. The court did not limit the instruction only to the jury's determination of guilt or innocence of Whitson; the instruction was that the jury not consider the statement at all. Defendant Whitson on this appeal contends that, since Turston did not take the stand and was not subject to cross examination, the statement violated Whitson's sixth amendment right of confrontation. He asserts further that the error was not corrected by the instruction given to the jury immediately after the statement was made by Nixon.

Defendant's argument is based primarily on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 467; People v. Armstrong, 41 Ill.2d 390, 243 N.E.2d 825; and other cases following Bruton. In Bruton the Supreme Court held that, despite instructions to the jury to disregard the statements in a co-defendant's confession which implicated the defendant, the admission thereof violated the defendant's right of cross examination secured by the sixth amendment confrontation clause.

There is no doubt that as to Whitson the statement allegedly made by Turston was inadmissible hearsay which, when admitted, violated Whitson's right of confrontation as set out in the Bruton rule. People v. Armstrong; People v. Scott, 100 Ill.App.2d 473, 241 N.E.2d 579.) However, it is certainly of some significance in assessing the damage caused by allowing the jury to hear the statement attributed by Nixon to Turston, that the jury was instructed not to consider the statement at all as evidence. "And unlike the situation in Bruton, the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial." Frazier v. Cupp, 394 U.S. 731, 735, 89 S.Ct. 1420, 1423, 22 L.Ed.2d 684. Furthermore, a violation of the Bruton rule does not require reversal if a reviewing court can determine the effect of the improperly admitted statement to be harmless error. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284; Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340.

"We held in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 that 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' * * * We said that although 'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error' * * * not all 'trial errors which violate the Constitution automatically call for reversal.'" Harrington v. California, 395 U.S., at 251-252, 89 S.Ct., at 1727.

Before we can hold a federal constitutional error to be harmless, we must be able to declare that it was harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705. To properly determine whether such error is harmless error, the question this court must answer is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. (Schneble v. Florida; People v. Smith, 15 Ill.App.3d 10, 304 N.E.2d 50.) Another way of stating the same question is whether the minds of the average jury would have found the State's case significantly less persuasive had the improper evidence been omitted. (Schneble v. Florida; People v. Smith, 15 Ill.App.3d 10, 304 N.E.2d 50.) The answer to this question must be determined on the basis of "our own reading of the record and on what seems to us to have been the probable impact* * * on the minds of an average jury." Schneble v. Florida, 405 U.S., at 432, 92 S.Ct., at 1059-1060, citing Harrington v. California, 395 U.S., at 254, 89 S.Ct., at 1728.

In the instant case, as discussed above, the testimony of Boland sufficiently described the two beatings of Boland by Whitson to force him to submit to anal intercourse. Boland's testimony also sufficiently described the sexual assault by Whitson. Furthermore, the testimony of Nixon, apart from the extrajudicial statement attributed to Turston, described in detail the initial suggestion made by Whitson that they have intercourse with Boland and the first beating of Boland by Whitson to force Boland to submit. Because Nixon left the group shortly after the first beating he had no direct knowledge of a sexual assault; however, at the time he left the group there had been no abandonment of the idea of forcing intercourse on Boland. Subject, of course, to the question of credibility, there was no legal reason why the jury could not have believed the testimony of and convicted Whitson on the basis of Boland's testimony, especially in light of the corroborative testimony of Nixon. The testimony left no reasonable possibility that

the jury would have found Whitson not guilty had they not heard the statement attributed to Turston. See People v. Smith, 15 Ill.App.3d 10, 304 N.E.2d 50. Therefore, we conclude that allowing the jury to hear the statement was harmless error beyond a reasonable doubt.

Defendant Whitson next contends that certain comments made by the State's Attorney in his closing argument as to witnesses not produced by Whitson were improper and prejudicial. Defendant Whitson refers to the following portion of that argument:

"What evidence did Whitson put on the stand? Not one centiliter (sic) of evidence to show where he was. Where, for instance, is Mrs. Sympton, the wife of the head of the penitentiary? Where is she in court? How come she didn't testify in court if he was called by her to wash the dishes? Where are the guards from the penitentiary as to when Whitson checked in and out of the penitentiary? Do you see them here today? They could have been presented to testify, yet they are not anywhere to be seen. Where, for instance, is (Williams)* * *? He is just as available for defense to testify as the State."

As a general rule, it is improper for a prosecutor to comment on defendant's failure to produce witnesses when those witnesses are equally available to the State as to the defendant. (People v. Rubin, 366 Ill. 195, 7 N.E.2d 890; People v. Munday, 280 Ill. 32, 117 N.E. 286; People v. Stephens, 18 Ill.App.3d 971, 310 N.E.2d 824.) In the instant case no objection was made to any of the above mentioned comments of the State's Attorney; however, even when not objected to, such comments can constitute reversible error. (People v. Smith, 74 Ill.App.2d 458, 221 N.E.2d 68.) On the other hand, when the defendant has injected into the case his activities with a potential witness during a particular period of time ostensibly for the purpose of proving his innocence of the crime charged, his failure to produce such witnesses can properly be commented upon by the State. (People v. Swift, 319 Ill. 359, 150 N.E. 263; People v. Stephens, 18 Ill.App.3d 971; 310 N.E.2d 824; People v. Lenihan, 14 Ill.App.2d 490, 144 N.E.2d 803.) In such a situation the only limitation, as pointed out in Stephens, is that the comment must be legitimate in scope and not misleading or unfair.

Thus as to the absence of Mrs. Sympton and of the guards who would have checked Whitson in and out of the penitentiary, the comments of the State's Attorney were not improper. Defendant Whitson had injected them into the case as potential alibi witnesses during his testimony. He had stated that he had been called up from the basement of

the warden's house by Mrs. Sympson to do the dishes at about 2:00 or 3:00 p.m. and that he saw Mrs. Sympson at that time. He had also stated that he had checked into the penitentiary at about 12:00 or 12:30 p.m. and out of the penitentiary at about 1:00 or 1:30 p.m. Under these circumstances the comments of the State's Attorney were proper; they were sufficiently limited and were not misleading or unfair.

As to the absence of Williams, the comments of the State's Attorney were also proper. While the general rule is that it is error for the State's Attorney to comment on the failure of the accused to produce witnesses who are equally accessible to the prosecution, when the defense attorney has commented about the failure of the State to produce certain witnesses the State's Attorney can ask defendant's counsel why he did not bring in the same witnesses, as long as the remarks of the State's Attorney are properly limited to a reply to defense counsel's comment. (People v. Wheeler, 5 Ill.2d 474, 126 N.E.2d 228; People v. Heywood, 321 Ill. 380, 152 N.E. 215.) During Whitson's attorney's closing argument he made the following comment?

"And you know what should be commented on is this Indian Chief Williams. I think it's a fair summation of all the testimony you heard that none of this would have happened to the boy (Boland) if Williams hadn't been involved. The State didn't produce him either."

Thus the State's Attorney's comment was in the nature of a properly limited reply.

The final contention on this appeal is that defendant Turston was prejudiced by an improper statement of the law of accountability in the closing argument of the State's Attorney, in that the State's Attorney stated that mere presence could constitute accountability. The State's Attorney made the following remarks:

"Now there's another theory you will be instructed on it by the court. That theory simply is anyone who aids of (sic) abets another one in the commission of an offense is as guilty as if he committed the offense himself. That's our law in Illinois. Now when defense counsel gets up and argues his man, Turston, had nothing to do with this, remember me. Who was in that 24-hour shack? Who aided or abetted or helped the commission of that offense is as guilty as if he raised that pipe himself. Whitson hit him and Turston did nothing to help Boland. He is as guilty in the State of Illinois as though he struck the blow himself. At the time when Nixon left the group had already committed battery and aggravated battery. You'll be instructed by the Court battery is touching someone in an insulting or provoking nature. Decada Nixon testified Turston was hugging Boland around the waist. If

Turston was hugging him and Whitson was in the room, Whitson is as guilty under the accountability theory."

Defendant brings our attention only to those parts of the State's Attorney's argument which we have emphasized above. If we looked at the emphasized statements by themselves we would agree that the State's Attorney has improperly stated the law of accountability. However, we must view those comments not as isolated events, but rather in the total context in which they were made. . Viewing the remarks in that manner it is clear that the State's Attorney did not indicate that mere presence during the commission of an offense would constitute accountability. The very first part of the State's Attorney's explanation of the law of accountability told the jury that accountability consisted of aiding and abetting another in the commission of a crime. Although the State's Attorney's explanation was not as complete as the statutory definition of accountability (Ill.Rev.Stat. 1973, ch. 38, sec. 5-2(c),) we do not believe it was misleading. Moreover, no objection was made to these remarks of the State's Attorney. Except in those cases in which the argument of counsel is so prejudicial that the defendant cannot receive a fair trial, unless objections to the alleged prejudicial statements are made in the trial court, and a ruling of the court is obtained, and the record shows the objection and the ruling preserved, such assignments of error will not be considered on appeal. (People v. Moore, 9 Ill.2d 224, 137 N.E.2d 246; Belfield v. Coop, 8 Ill.2d 293, 134 N.E.2d 249; Gaddie v. Whittaker, 344 Ill. 149, 176 N.E. 373.) We do not consider the unobjected to remarks of the State's Attorney were so prejudicial that they deprived either defendant of a fair trial.

We should also point out that Turston's attorney emphasized in his closing argument that mere presence does not constitute accountability and that the court gave a proper jury instruction on the law of accountability.

For the above reasons, the convictions of both defendants are affirmed.

Affirmed.

CONCUR:

EBERSPACHER, J. and CARTER, J.

PUBLISH IN ABSTRACT ONLY.

STATE OF ILLINOIS



75-182

APPELLATE COURT

THIRD DISTRICT

OTTAWA

vs. David Dery and Clarence Schwark

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

August 15, 1975

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1975.

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

DAVID DERY and CLARENCE SCHWARK,
Defendants-Appellants.

) Appeal from the
) Circuit Court of
) Will County

)
) Honorable
) Michael A. Orenic
) Presiding Judge

PER CURIAM

Abstract

Defendants David Dery and Clarence Schwark appeal from a judgment of conviction of Attempt Escape and from the sentence of 1 to 3 years, to run consecutive to the terms which defendants were serving at the time of the offense.

Appellants had filed a timely notice of appeal and on September 27, 1974, the Circuit Court appointed the Office of the State Appellate Defender to represent defendant on appeal. On July 29, 1975, the State Appellate Defender notified defendants that he would file a motion for leave to withdraw in accordance with the precedent in Anders v. California (1967), 388 U.S. 738. Such motion for leave to withdraw and a brief in support thereof was filed in this Court. The State Appellate Defender likewise asserts in the motion that after careful examination of the record, the Appellate Defender has concluded that an appeal would be frivolous and without possibility of success. They accordingly ask this Court to enter an order authorizing such Appellate Defender to withdraw as counsel on appeal.

From the record it appears, on April 25, 1974, defendants David Dery and Clarence Schwark together with Charles Count were indicted by the Will County Grand Jury on a charge of Attempt Escape, under Illinois Revised Statutes, 1973, Ch. 38, §1003-6-4(a)(C4). The offense occurred on October 20, 1973, while defendants and Count

were incarcerated in Stateville Prison. The indictment properly charged the offense and counsel was appointed to represent defendants and represented them competently through the trial proceedings.

On August 19, 1974, defendants and Count moved for a discharge, and alleged that their statutory and constitutional rights to a speedy trial had been violated. This motion was denied. Following denial of the motion, Count was allowed to waive counsel and to proceed pro se and his case was severed from that of defendants for purposes of trial.

Defendants' motion for discharge was founded on the contention that they had been in court custody on the charges to which we are now concerned since October 21, 1973, for the reason that they were, at that time, placed in segregation in Stateville Prison as a result of their attempted escape, despite the fact that they were not indicted until April 23, 1974. At the hearing on this motion, defendants testified that the segregation resulted from their attempt escape. The assistant warden of Stateville testified that in his opinion, however, appellants were segregated because they had broken an institutional rule and not at all because they had violated a criminal statute. The trial court concluded that defendants were not in custody while segregated for the purpose of consideration of the 120-day rule. (Illinois Revised Statutes, 1973, ch. 38, §1003-5(a). The court concluded that the 120-day period should be calculated from the date of the indictment, and that none of the constitutional rights of defendants were prejudiced by the ten-month delay between the date of the offense and the trial.

The court's determination that the 120-day period did not commence until the indictment is correct. In People v. Arbuckle (1964), 31 Ill. 2d 163, 201 N.E.2d 102, the Illinois Supreme Court found that there was no violation of the four-term provision where the defendant who escaped from the penitentiary was tried more than 120-days after his recapture, but within 120 days of indictment. The court was likewise correct in finding that the institutional segregation of previously incarcerated prisoners is not the equivalent of being taken into custody

on a criminal charge, since segregation is merely an administrative disciplinary sanction imposed on a prisoner for breaking the rules of the prison (Gregory v. Wise, 512 F.2d 378). It has no direct relation to the bringing of further and separate criminal charges. (Adams v. Carlson, 488 F.2d 619). (See also: 8804, Administrative Regulations, State of Illinois, Department of Corrections, Adult Division). Since the 6th Amendment speedy trial provision is applicable only after a person is accused of a criminal offense and since no prejudice from any delay of the prosecution was established, appellants' constitutional rights to a speedy trial were not violated. (United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468). Appellants further contention that their constitutional right to a speedy trial was violated by the delay of the State in bringing criminal charges is without merit since there is no constitutional right to be arrested. (Hoffa v. United States, 385 U.S. 293, 17 L.Ed. 2d 374, 87 S.Ct. 408). The court's ruling on the motion for discharge was therefore correct.

Defendants waived their right to a jury trial and the case was heard by the trial court. The State established, through the testimony of seven witnesses, that defendants were incarcerated at Stateville on October 30, 1973, and that on such date they cut the bars at their cells, placed dummies in their beds, and left their cells. The defendants were subsequently found at the base of the prison wall with a homemade ladder, gloves, a flashlight, and an electrical cord in their possession. The State further showed that defendants had access to the materials from which the ladder was made. No evidence was presented on behalf of defendant.

The court found defendants guilty of attempt escape and on the strength of the State evidence the court's judgment of guilt beyond a reasonable doubt was justified.

Following pre-sentence reports and a sentencing hearing at which each appellant testified, the court sentenced each appellant to a term of from one to three years in the penitentiary with the sentence to run consecutively to their current terms. Attempt Escape is a

Class 2 felony and the sentences imposed are the minimum applicable terms. (Illinois Revised Statutes, 1973, ch. 38, §1003-6-4(a); §1005-8-1(c)(3)). Since the offense was committed while the defendants were serving in the Department of Corrections, the sentences are required by statute to run consecutively to current terms of incarceration. (Ill. Rev. Stat., 1973, ch. 38, §1005-8-4(f)).

From an examination of the record and since the State Appellate Defender has found no error to raise on this appeal, it is obvious that an appeal would be wholly frivolous and without possibility of success. The judgment of the Circuit Court of Will County is, therefore, affirmed and the motion of the State Appellate Defender for leave to withdraw is granted.

Affirmed and Leave to
Withdraw Granted.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE FREDERICK S. GREEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 21st day
of August A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12402

Agenda No. 75-8

Edward D. Groshong, ex rel)	
Forrest L. Tisdel,)	
)	
Petitioner-Appellant)	
	)	Appeal from
v.	)	Circuit Court
	)	Sangamon County
Hugh A. Campbell, Sheriff	)	228-73
Sangamon County, Illinois)	
)	
Respondent-Appellee)	

Mr. JUSTICE TRAPP delivered the opinion of the court:

On May 3, 1973, the trial court denied relator's, Tisdel's petition for a writ of habeas corpus. On June 22, 1973, an administrative hearing before a representative of the Governor was held at which petitioner appeared. The issues before the hearing officer were resolved against petitioner. On July 9, 1973, petitioner filed a motion in the Circuit Court entitled "Motion for Reargument and Rehearing concerning Petition for Habeas Corpus". The State's Attorney filed a motion to dismiss. Petitioner appeals from the order of the Circuit court entered July 11, 1973, denying his motion for "Reargument and Rehearing".

The denial of the petition for writ of habeas corpus on May 3 was in the form of a final judgment. It is apparent that

no notice of appeal was taken within 30 days as required by Supreme Court Rule 303(b). Habeas corpus is a civil proceeding. People ex rel. Borelli v. Lohman, 13 Ill.2d 506, 150 N.E.2d 116; People ex rel. Rukavina v. Sain, 22 Ill.2d 546, 177 N.E.2d 110.

The colloquy of counsel in the record discloses that at the hearing before the representative of the Governor on June 22, the hearing officer gave petitioner three weeks to file additional matters or "to contest the extradition". The motion for "Reargument and Rehearing" was petitioner's response to such leave granted by the administrative officer. At such time the trial court had lost jurisdiction of the matter following its order of May 3. The leave granted by the administrative officer neither returned the matter to the circuit court nor created jurisdiction in that court.

The parties have filed supplemental briefs in response to questions during oral argument concerning the jurisdiction of the trial court for purposes of "Rehearing and Reargument".

Petitioner's position is that the trial court must have "(C)onsidered the issue of its own jurisdiction at the second judicial hearing on July 11, 1973", and that the trial court ruled that it would hear evidence. Further responding, petitioner says:

"It is the position of Petitioner-Appellant that the Trial Court had jurisdiction to consider the aforesaid two (2) motions of Petitioner under the authority of Illinois Revised Statutes, Chapter 110, Section 72.

Appellant suggests that the Trial Court treated Appellant's two (2) aforesaid post hearing motions together as, in effect, a Petition for relief under Section 72 of the Illinois Civil Practice Act."

Such motion for "Rehearing and Reargument" is lacking in many requirements of a proceeding under Section 72 of the Civil Practice Act - it is not supported by affidavit and it contains no allegation of "(M)atters of fact which would have prevented the rendition of judgment had the true facts been known to the court when the judgment was entered". Although not referred to in the "motion", counsel announced at the hearing that petitioner wished to introduce newly discovered evidence and after some discussion such testimony was heard.

The assistant State's Attorney present did not object to the trial court's jurisdiction specifically, although he noted that habeas corpus had been denied on May 3. He ultimately did participate by cross-examining and arguing the context of the motion.

It is not contended that petitioner is not the person named in the warrant or that he is not substantially charged with a criminal offense. He did undertake to show that he was not a fugitive from justice upon his contention that he was not in the demanding state at the time of the offense. (People ex rel. Levin v. Ogilvie, 36 Ill.2d 566, 224 N.E.2d 247.) In his testimony, however, he did admit that he was in the demanding state upon one of the dates at issue. He thus failed to

satisfy the rule that one seeking discharge from the rendition warrant through habeas corpus must conclusively prove that he was not in the demanding state when the offense was committed. People ex rel. Blassick v. Callahan, 50 Ill.2d 330, 279 N.E.2d 1.

Petitioner complains that the rendition warrant and its supporting documents were not introduced into the record of the respondent at the hearing on July 11. The transcript of the proceedings shows extensive reference to a number of documents by court and counsel which were apparently the warrant and its supporting documents. Much of the argument was directed to data contained in such documents, although there was no clear reference as to what such were. Petitioner introduced exhibits in his own behalf, but made no effort to introduce the documents which were discussed and referred to in the proceeding. Upon petitioner's hypothesis that the motion reargued was treated as a proceeding under Section 72 of the Civil Practice Act, the burden was upon him to go forward with the evidence and to aver and prove the facts which would entitle him to relief. People v. Donahoe, 223 Ill.App. 277, Brunswick v. Mandel, 59 Ill.2d 502, 322 N.E.2d 25.

At the initial hearing on May 3, the single issue presented to the court was that petitioner had been adjudged mentally ill in Illinois, that there had been no judicial restoration but that he had escaped from a state hospital in 1957. It was then argued that the Uniform Act for Extradition of Persons of Unsound Mind (Ill.Rev.Stat., ch.91 1/2, §§122-123)

provided the only procedure whereby petitioner could be extradited to the exclusion of the provisions of the statute concerning fugitives from justice. The argument that public policy prevents the extradition of petitioner, a person who had been adjudged mentally ill some 15 years earlier upon these criminal charges, is not supported by authority. The trial court did not err in denying a writ of habeas corpus upon such grounds.

We have reviewed the issues as presented by petitioner in the trial court and find no valid reason to reverse this judgment.

The judgment is affirmed.

AFFIRMED.

SIMKINS, P.J., and GREEN, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable ALBERT E. HALLETT, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On August 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

11 9 21 3
AUG 21 1975

No. 74-321

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 18th Judi-
v.	)	cial Circuit, DuPage
	)	County, Illinois..
MICHELLE S. MONROE,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant was convicted in a bench trial of being a person under the age of 19 years in possession of alcoholic liquor in violation of a provision of the Illinois Liquor Control Act. (Ill.Rev.Stat. 1973, ch. 43, par. 134a), and fined \$25 and costs. She appeals, contending that the proof was insufficient to establish that she was in possession of the contraband.

Defendant was one of five occupants of a car being driven in Wheaton. A city police officer stopped the vehicle after observing a "wired-on" license plate. He saw a partly full bottle of beer lying on the floor between the right front door and the front seat. The officer testified that the defendant had been seated in the front seat on the right side. He also stated that he discovered "spillage" on the floor and a bottle cap on the dashboard that fit the bottle on the floor. At the time all of the occupants of the car disclaimed ownership of the beer bottle.

At trial, one of the passengers who had been riding in the rear seat testified that defendant never had possession of the bottle. The witness further testified that she was herself unaware of its presence. The driver who was the owner of the car testified that the bottle belonged to him; that he had placed it in the vehicle several days before the arrest; and that it was in the same condition as the exhibit introduced at the trial. He testified that defendant did not have the bottle in her possession at any time to his knowledge. He also stated that the police officer first told him that the bottle was found underneath the front seat.

On these facts defendant argues that the evidence showed the mere presence of contraband but was not sufficient to prove that it was in the immediate and exclusive control of the defendant so as to charge her with possession.

The fact of possession must be proved beyond a reasonable doubt, and proof of proximity to the contraband alone is not sufficient to show possession. (People v. Millis (1969), 116 Ill. App.2d 283, 286.) To prove constructive possession there must be a showing that the defendant had the immediate and exclusive control of the area where the items were located. (People v. Millis, supra at 287.) The control may be "exclusive", however, even if possession is shown to be joint. (People v. Mosley (1971), 131 Ill.App.2d 722, 724.) Defendant's knowledge of the presence of the contraband must be shown in addition to proof of immediate and exclusive control. People v. Boswell (1974), 19 Ill.App.3d 619, 621.

Defendant principally relies on People v. Millis, supra. We agree that Millis is very similar factually to the case before us. In Millis, at the time of her arrest the defendant was seated in the front seat between the driver and another passenger. Upon investigation two open cans of beer were found on the floor in front

of the front seat near the defendant's feet. She testified that she had refused a proffered can of beer, and never had possession of the beer. The other two passengers pled guilty to the charge. The trial court convicted Millis and the appellate court reversed, concluding that the evidence was insufficient to show that defendant had the necessary possession of the beer beyond a reasonable doubt.

The State describes the Millis ruling as illustrative of the fact that possession is not established to be in a defendant passenger when any one of three persons in the car could have been in possession and the two others admitted that they had possession. The State argues that in the case before us there was evidence showing that the bottle was found in the area of the car within the immediate control of defendant, that the bottle was pointed forward, that there was spillage near the passenger's seat and the cap was on the dashboard, thus demonstrating that defendant had possession and with the requisite knowledge. We disagree.

The evidence before us does not support a finding that the defendant had possession of the beer bottle beyond a reasonable doubt nor does it overcome the testimony of the occupants that defendant at no time had possession of the bottle. Absent speculation or conjecture, the proof does not rule out the possibility, which may be as easily inferred from the record as the conclusion of the trial court, that the driver of the vehicle was in the immediate and exclusive control of the contraband, singularly, as he admitted. See People v. Boswell, 19 Ill.App.3d 619, 621, supra.

We therefore reverse the judgment of the trial court.

Reversed.

GUILD and HALLETT, JJ. concur.

United States of America

State of Illinois,)
Appellate Court,) ss.
Second District,)

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal
of the said Appellate Court, in Elgin, in said State, this 26th
day of April, A.D. 1976.

Loren J. Strotz
Clerk Appellate Court, Second District.





60426

AMERICAN EMPLOYERS' INSURANCE	)	APPEAL FROM CIRCUIT
COMPANY,	)	COURT OF COOK COUNTY.
)	
Plaintiff and Counter-)	
Defendant, Appellee,)	
)	
v.)	
)	
ALBERT HOPP,)	
	)	HONORABLE
Defendant and Counter-	)	L. SHELDON BROWN,
Plaintiff, Appellant.	)	PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, J., LORENZ, J., AND SULLIVAN, J.

The American Employers' Insurance Company filed this complaint in interpleader against defendants Albert Hopp, Reginald Weaire, Alfonso Splendorio, Joseph Olejniczak and Stanley Glowacki, employees of Michigan Express, Inc., to determine the extent of its liability to defendants under a surety bond in the face amount of \$10,000, executed by plaintiff to secure payments by Michigan Express to its injured employees under the Illinois Workmen's Compensation Act and the Illinois Workmen's Occupational Diseases Act. Michigan Express filed for bankruptcy in the federal district court in Michigan, and defendants proceeded against plaintiff under the bond to recover Illinois Industrial Commission awards for injuries and/or claims allegedly arising out of injuries suffered in the course of their employment. Hopp received an Industrial Commission award of \$8,135.15; Splendorio an award of \$488.25 and Olejniczak an award of \$1,420. The claim of Weaire was dismissed and never reinstated; Glowacki, allegedly injured subsequent to the expiration date of the bond but who nevertheless filed a claim against plaintiff, could not be located for service until some five months after the instant complaint was filed. Default judgment was entered against him by order of March 7, 1974. The complaint in interpleader alleged that defendants' claims exceed the amount of the bond and requested, inter alia, an adjudication of the amount which plaintiff

must pay to each of the defendants and an order giving plaintiff leave to deposit the amount of the bond with the clerk of court.

Hopp filed a timely answer to the complaint and subsequently filed several other documents in the form of a petition, a counter-claim, amendments to the counter-claim and motions. Those pleadings and other documents requested, in pertinent part, that Hopp be awarded the sum of \$8,135.15 in accordance with the orders of the Industrial Commission and the federal referee in bankruptcy that he proceed against the surety bond; that he be awarded, in addition thereto, interest, costs and attorney fees for the alleged vexatious and unreasonable delay on plaintiff's part in making such payment after his oral demand in January 1973; or that he be awarded attorney fees pursuant to the provisions of the surety bond.

It was ultimately ordered on March 7, 1974, that plaintiff deposit the sum of \$10,000 with a named bank; that upon making such deposit, plaintiff would be discharged from all liability to defendants; that the amount of \$10,000 was the limit of plaintiff's liability under the surety bond; that out of the \$10,000 on deposit Hopp was entitled to \$8,135.15, Splendorio to \$475.25 and Olejniczak to \$1,389.60; and that Weaire be dismissed from the action and a default judgment entered against Glowacki. It was further ordered that there was no just reason to delay enforcement or appeal of the judgment.

Defendant Albert Hopp alone prosecutes the instant appeal from that judgment. He contends that under the terms of the surety bond, which he argues must be interpreted most strongly against plaintiff, he is entitled to interest and attorney fees in excess of the face amount of the bond, and that plaintiff has expressly waived any defenses it may have had to his position in that regard.

The surety bond provides in pertinent part that plaintiff is "bound unto the people of the State of Illinois . . . in the full and just sum of Ten Thousand Dollars" and

"That if the Michigan Express, Inc., . . . shall . . . pay or cause to be paid direct to its employees the compensation due or that may become due on all accidents occurring subsequent to the date of the execution of this bond, . . . including a reasonable attorney's fee incurred by said employees in any action brought on this bond, . . . then this obligation shall be void; otherwise to be and remain in full force and effect."

It is settled law that where a contract is not ambiguous, no need arises for construction of the contract. (State Toll Highway Comm. v. Boyle & Co., 38 Ill. App.2d 38, 51-52, 186 N.E.2d 390.) A contract is ambiguous only when the language employed is susceptible to different constructions when read in its plain and ordinary meaning. Village of North Riverside v. Brookfield-North Riverside Water Comm., 15 Ill. App.3d 752, 305 N.E.2d 221.

The language of the instant surety bond is not ambiguous. There is consequently no need for construction of its terms, nor of construing its provisions most strongly against plaintiff, as Hopp requests. Concededly, the bond provides for the payment of claims of injured employees of Michigan Express and for payment of reasonable attorney fees arising in connection therewith. However, the attorney fees provided for in the bond are stated as "included" in the compensation payable thereunder and not "in addition" to such compensation, as Hopp argues. Further, the compensation payable under the bond, including attorney fees, must be read in light of the plaintiff's monetary undertaking, which is expressly limited to the sum of \$10,000. The trial judge reduced the awards of Splendorio and Olejniczak slightly to reach the limit on the bond to \$10,000.

Ordinarily attorney fees are not payable under a surety bond unless otherwise expressly provided therein; while no Illinois

authority has been cited or found in support of that proposition, other jurisdictions follow that rule. (Hartford Accident & Indem. Co. v. Industrial Accident Comm., 216 Cal. 40, 13 P.2d 699; Hartford Fire Ins. Co. v. Casey, 196 Mo.App. 291, 191 S.W. 1072.) The terms of the instant surety bond, while authorizing the payment of attorney fees, do not permit of the payment of such fees in an amount which would subject plaintiff to liability in excess of the sum of \$10,000 expressly payable under the bond.

The cases cited by Hopp in support of his position are not applicable to the instant circumstances. In State v. Birkins, (Del.) 78 A.2d 868, a trial court decision, it was held that the bond in question covered attorney fees, bringing the total amount payable in excess of the penalty clause in the bond. However, the penalty clause was there limited to the aggregate of specific amounts apparently stated in the bond as due various creditors, whereas the bond also called for the payment of "costs and expenses," which the court interpreted as including attorney fees. In Dwyer v. United States, 93 F. 616, the costs which the claimant received under the bond were incurred by him by reason of the obligor's failure to pay the claim on demand and by reason of the subsequent legal action; the court there specifically noted that recovery in that regard was not ordinarily within the letter or the spirit of the settled rule that no damages can be recovered in excess of the penalty contained in a bond.

Nor does it appear that Hopp is entitled to attorney fees and costs pursuant to Section 155 of the Illinois Insurance Code relating to the vexatious and unreasonable delay on the part of an insurance carrier on the payment of claims. (Ill. Rev. Stat. 1973, ch. 73, par. 767.) The face amount of the instant surety bond was \$10,000, whereas plaintiff was confronted with claims aggregating an amount in excess thereof after Michigan Express,

the principal under the bond, instituted bankruptcy proceedings. Plaintiff faced the possibility of liability in excess of its monetary undertaking if each claim were to be paid on demand, and it was therefore neither unreasonable nor vexatious to delay honoring those claims by submission of the matter for judicial resolution. Hopp is not entitled to attorney fees pursuant to that statute under such circumstances.

Hopp's final contention, that plaintiff expressly waived any defenses which it may have had against claims under the bond, is likewise without merit. The bond provides in that regard that the employees of Michigan Express are "empowered and authorized to maintain direct action on this bond, and no defense against such direct action may or shall be interposed by the surety. . . ."

Hopp's claim for attorney fees in excess of the limits of the bond certainly cannot be said to constitute a "direct action" on the bond. It would be anomalous to hold that Hopp is not entitled to the attorney fees claimed for the reason that they are in excess of plaintiff's monetary undertaking under the bond, while at the same time holding that plaintiff is unable to assert that fact in defending against such improper claim. Plaintiff's waiver of defenses in the bond must be read in conjunction with the provision therein which permits the Michigan Express employees, not otherwise immediate parties to the undertaking, a direct action against the surety on the bond. Plaintiff properly contested the payment of any sums in excess of its monetary undertaking in the bond.

In light of the views expressed herein the judgment of the trial court is affirmed.

AFFIRMED.

Abstract only.

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,) APPEAL FROM THE CIRCUIT
v.) COURT OF COOK COUNTY.
DON BEAMON,)
Petitioner-Appellant.) HONORABLE
LOUIS B. GARIPPO,
PRESIDING.

PER CURIAM:

On August 14, 1962, petitioner filed a pro se post-conviction petition which was subsequently dismissed upon motion of the State. The Illinois Supreme Court denied his petition for a writ of error. (Memorandum Opinion 3425, March 27, 1963.)

The State Appellate Defender who was appointed to represent petitioner on appeal has filed a motion in this court for leave to withdraw as counsel on appeal. The motion supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states that the only possible issue which could be raised on appeal is that petitioner's second post-conviction petition was improperly dismissed by the trial court. The brief concludes

that an appeal on this issue would be wholly frivolous and without merit. Petitioner was mailed copies of the motion and brief on May 19, 1975. He was informed that he had until July 18, 1975, to file any additional points he might choose in support of his appeal. He has responded.

The motion and brief of the State Appellate Defender state that the only possible issue which could be raised on appeal is that petitioner's second post-conviction petition was improperly dismissed by the trial court. Petitioner was originally convicted on January 7, 1959. At that time, the Illinois Post-Conviction Hearing Act provided for a five year statute of limitations unless petitioner alleged facts showing that the delay was not due to his culpable negligence. (Ill. Rev.Stat. 1959, ch.38, par.826.) The section of the Act providing for a five year statute of limitations was amended in 1965 to extend the period to twenty years. (Ill.Rev.Stat. 1965, ch.38, par.122-1.) However, this amendment does not apply retroactively. (People v. Thomas (1970), 45 Ill.2d 68, 256 N.E.2d 794; People v. Reed (1969), 42 Ill.2d 169, 246 N.E. 2d 238.) Here, petitioner's second post-conviction petition was properly dismissed in that it was not filed within the five year statute of limitations.

Further, petitioner had previously filed a post-conviction petition in 1962. That petition was dismissed and the Illinois Supreme Court denied petitioner's petition for a writ of error. (Memorandum Opinion 3425, March 27, 1963.) The Post-Conviction Hearing Act provides: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." (Ill.Rev.Stat. 1973, ch.38, par.122-3.) Here, since petitioner had previously filed a post-conviction petition, any claim not raised in that petition is deemed waived. Petitioner cannot now maintain a second post-conviction petition. People v. Barber (1972), 51 Ill.2d 268, 281 N.E.2d 676; People v. Chapman (1965), 33 Ill.2d 429, 211 N.E.2d 712.



In his response to this court petitioner argues that he was denied his constitutional right to a fair and impartial jury trial in that all blacks were systematically excluded from the jury during his trial. We have previously held that petitioner's second post-conviction petition was properly dismissed. In addition, the rule is well established that where a defendant takes a direct appeal of his conviction, all claims which are raised in that proceeding cannot be raised subsequently in a post-conviction proceeding under the doctrine of res judicata. (People v. Weaver (1970), 45 Ill.2d 136, 256 N.E.2d 816.) The concept of res judicata also includes all claims which were known from the original trial record and could have been raised on direct appeal but were not those claims being considered waived. (People v. Adams (1972), 52 Ill. 2d 224, 287 N.E.2d 695.) Here, petitioner's present argument was fully known from the original trial record and could have been raised on direct review. Since petitioner did not raise this argument on direct review, he is now barred from raising the argument for the first time in a post-conviction petition.

We have examined the record and concur in the opinion of the State Appellate Defender that the argument thus raised is not arguable on its merits and is wholly frivolous. Our inspection of the record did not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the motion of the State Appellate Defender to withdraw as counsel on appeal is allowed and the judgment of the circuit court of Cook County dismissing the post-conviction petition is affirmed.

Motion allowed;
Judgment affirmed.

61018



31 I.A. ^{3D} 146

PEOPLE OF THE STATE OF ILLINOIS,

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

Respondent-Appellee,)

v.)

JOHN V. COLLINS,)

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.)

Petitioner-Appellant.)

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, J., LORENZ, J., AND SULLIVAN, J.

Petitioner appeals from the denial, after an evidentiary hearing, of his post-conviction petition.

On July 31, 1973, he was convicted upon his plea of guilty of the crime of armed robbery (Ill. Rev. Stat. 1973, ch. 38, par. 18-2). He was sentenced to a term of four to six years but did not appeal that conviction. On July 9, 1974, he filed a post-conviction petition, alleging that his plea of guilty was involuntarily entered in that it was based upon the statements of his counsel that he would receive a sentence credit for the period from June 16, 1971, to July 31, 1973, during which an Illinois detainer had been placed against him while in custody in the State of Wisconsin for a separate offense. On August 1, 1974, after an evidentiary hearing, the post-conviction petition was denied.

At the hearing the following evidence was adduced: Thomas J. Royce, an assistant public defender, testified that he was petitioner's trial counsel. Prior to petitioner entering his negotiated plea of guilty, Royce had discussed the case with petitioner on four or five different occasions. Royce stated that from these discussions he was aware that petitioner had spent 25 months in a Wisconsin penitentiary on a separate charge after an Illinois detainer had been lodged against him. He had informed petitioner that it was his opinion, in light of certain recent cases and pending legislation, it was possible for petitioner to get a



sentence credit for the time served in Wisconsin. Royce informed petitioner that it would be best to wait until after sentence was imposed before attempting to get the credit. He did not at any time tell him that he would definitely get the sentence credit. Petitioner was told that he had ". . . a very good chance -- I think perhaps I might have even used 'excellent' to get that time credit and he [petitioner] said okay, let's go; . . ."

John Collins, petitioner, testified that after he entered his plea of guilty, he filed a petition requesting a sentence credit for the time he had served in Wisconsin after an Illinois detainer had been placed against him. He received an order granting him the sentence credit, but the order was not honored. He testified that prior to entering a plea of guilty, his counsel had discussed with him various legal theories upon which he might be able to get credit for the time served in Wisconsin, and that he was under the impression he would get a sentence credit for the time served in Wisconsin at the time he entered his plea of guilty. He stated he would not have entered his plea of guilty if he had known that he would not receive the credit.

Petitioner's only contention on appeal is that he is entitled to post-conviction relief on the allegation in his petition that his plea of guilty was involuntary in that it was based upon statements of his attorney that he would receive a sentence credit for the time served in Wisconsin. Petitioner urges that this court grant him credit for the period from June 16, 1971, until July 31, 1973, the time petitioner was incarcerated in Wisconsin after the Illinois detainer for the instant offense had been lodged against him. A guilty plea, if induced by an unfulfilled promise of leniency, loses its voluntary nature and should be considered void. (People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386.) However, a guilty plea made in reliance upon advice of

counsel estimating an expected sentence is a voluntary plea. The mere fact that an accused hopes and believes that he will receive a certain sentence or milder punishment presents no grounds for permitting withdrawal of the plea after the accused finds that his expectations have not been realized. People v. Carmichael, 17 Ill. App.3d 249, 307 N.E.2d 770.

In the case at bar the testimony of petitioner's trial counsel established that he had informed petitioner he had a very good chance of getting the sentence credit for the time served in Wisconsin. He did not at any time tell petitioner he would definitely get this credit. Counsel's statements to petitioner represented his view of the law and how the law would be interpreted in petitioner's case, and his testimony clearly established that his advice to petitioner was his opinion rather than an affirmative promise. Under these circumstances, we conclude that the petitioner's plea of guilty was premised upon his attorney's opinion as to how the law would be applied in petitioner's case but was not premised upon an affirmative promise of his counsel that petitioner would get the sentence credit. Petitioner's plea of guilty was entered voluntarily, and the trial court properly denied petitioner's post-conviction petition.

The State argues that petitioner's post-conviction petition contained only conclusional allegations, unsupported by affidavit, and was therefore insufficient under the Post-Conviction Act. In view of the fact that an evidentiary hearing was held and we have concluded the trial court properly ruled at the conclusion of the evidentiary hearing, a consideration of this argument is unnecessary.

The post-conviction petition requested in the alternative that a writ of mandamus issue directing the Department of



Corrections to give him sentence credit. This issue was not raised on appeal, and no process was issued so that jurisdiction for a mandamus action was not established.*

The judgment denying petitioner's post-conviction relief is affirmed.

AFFIRMED.

Abstract only.

* In its brief the State comments:

"However, as suggested by the court in dismissing the post-conviction petition, this statutory claim might well provide petitioner with a basis for relief through a mandamus action, most probably to be brought in Will County. In fact, petitioner's chances of success in such a mandamus action are perhaps even better than the court had estimated."

61621

3D
31 I.A. 147✓

SEP 25 1975
ASSOCIATES

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.
Plaintiff-Appellee,)
)
v.)
)
LARRY GREENE,) HONORABLE
) DAVID J. SHIELDS,
Defendant-Appellant.) PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Following a bench trial defendant was found guilty of unlawful use of weapons (Ill. Rev. Stat. 1973, ch. 38, par. 24-1(a)(4)), sentenced to one year's probation and fined \$200. On appeal he contends that (1) the trial court committed reversible error when it accepted his ineffective waiver of counsel and (2) he did not knowingly and intelligently waive his right to a jury trial. Defendant does not contest the sufficiency of the evidence to establish his guilt.

Immediately prior to trial, defendant and the trial judge engaged in the following colloquy:

"THE COURT: Larry Greene, are you ready for trial?
DEFENDANT GREENE: Yes, sir.
THE COURT: How do you plead to the charges?
DEFENDANT GREENE: Which charge?
THE COURT: The unlawful use of weapons.
DEFENDANT GREENE: Not guilty.
THE COURT: Do you want to go to trial before this
Court without a jury and without a lawyer?
DEFENDANT GREENE: Yes.
THE COURT: You have your own T.V. repair shop?
DEFENDANT GREENE: No, sir.
THE COURT: You work there full time?
DEFENDANT GREENE: Yes.
THE COURT: How much do you earn there?
DEFENDANT GREENE: \$125 a week.
THE COURT: Do you want to go ahead without a lawyer?
DEFENDANT GREENE: I don't think a lawyer should be
necessary.
THE COURT: All right. That's your decision.
* * *
THE COURT: . . . The defendant is ready for trial.
The jury is waived. Do you consent to be tried
by this Court without a jury and without a lawyer?
DEFENDANT GREENE: Yes."

The trial record reveals that defendant was stopped by two Chicago police officers on the West Side of the city for a minor



traffic violation. One of the officers testified that he noticed defendant make a furtive gesture as if he were placing something under the front seat of his vehicle. The officers approached defendant's vehicle and recovered a .25 caliber automatic pistol. Defendant was then placed under arrest. At no time did he offer any resistance.

Opinion

Defendant contends that the trial court committed reversible error in accepting his waiver of counsel. He argues that the court's failure to explain the risks of going to trial without an attorney, the nature of the charge against him, the possible sentence that he could receive and the fact that if he was indigent an attorney would be appointed for him, prevented him from knowingly and intelligently waiving his right to counsel.

"In order that the court may be sure that an accused fully understands his right to counsel and intentionally relinquishes that right, something more than a routine inquiry by the court is required." (People v. Bush, 32 Ill.2d 484, 487-488, 207 N.E.2d 446.) To assure that a waiver of counsel will not be accepted without adequate admonishment, Supreme Court Rule 401(a) (Ill. Rev. Stat. 1973, ch. 110A, par. 401(a)) was promulgated. It provides:

"Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of a crime punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."



The purpose underlying the rule is clear - "to provide a procedure which will eliminate any doubt that the accused understands the nature of the charge against him and its consequences; and to preclude the accused from . . . waiving the right to counsel without full knowledge and understanding." (People v. Schrodt, 8 Ill. App.3d 660, 662, 289 N.E.2d 652.)

Applying these principles, waivers of counsel have been held invalid where insufficient effort was made by the trial court to determine whether the defendant could afford counsel and inform him that if he was indigent, counsel could be appointed to represent him. (Schrodt; People v. Brooks, 17 Ill. App.3d 974, 309 N.E.2d 42.) In addition, the adequacy of admonishments with regard to informing a defendant of the nature of the crime with which he was charged and the minimum and maximum sentence which could be imposed have been pointed to as significant factors in determining the effectiveness of a waiver of counsel. Cf. People v. Lindsey, 17 Ill. App.3d 137, 308 N.E.2d 111.

In the instant case we believe that the court did not make a sufficient inquiry to determine whether defendant fully understood his right to counsel and whether he intelligently relinquished that right. No attempt was made to determine whether defendant understood the nature of the offense of unlawful use of weapons. He was not informed of the fact that if convicted he could be incarcerated for a term of up to one year and be fined up to \$1000. In addition, we believe that the trial court's attempts to discover whether defendant could afford counsel were inadequate. Although, in response to questioning, defendant stated that he made \$125 a week as an employee in a T.V. repair shop, no inquiry was made as to whether his domestic expenses left him with sufficient funds to hire an attorney. We note that during the hearing on sentencing it was revealed that defendant was married and had



three stepchildren. In short, we find that this record does not demonstrate compliance with the requirements of Supreme Court Rule 401(a) by the trial court.

We hold that defendant did not effectively waive his right to counsel, and we therefore reverse his conviction and remand the cause for further proceedings. In view of this holding, we need not reach defendant's second contention regarding jury waiver.

REVERSED AND REMANDED.

Barrett, P.J., and Sullivan, J., concur.

Abstract only.



311.A. 244



No. 60845

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
)	
v.)	_____
)	
NATHANIEL JACKSON,	)	HONORABLE
	)	GEORGE E. DOLEZAL
Defendant-Appellant.)	)	PRESIDING

Before BARRETT, P.J., DRUCKER, J. and SULLIVAN, J.
PER CURIAM: (First District, Fifth Division)

This is an appeal from an order revoking probation and sentencing defendant to a term of not less than three years nor more than ten years in the penitentiary. On appeal, defendant contends (1) it was violative of due process to revoke his probation for the commission of a minor traffic offense, for which he was uncharged, and for his involvement in a gun possession charge of which he was exonerated; (2) the trial court's assumption of a prosecutorial role denied him his right to a fair hearing and effective assistance of counsel, and (3) the time served on probation should be credited against the penitentiary sentence imposed for violation of said probation.

On August 6, 1969 defendant entered his plea of guilty to charges of armed robbery and involuntary manslaughter and was sentenced to five years probation on each charge to run concurrently. In April, 1970, during the probationary period, an arrest warrant was issued against defendant for violation thereof and, in June, 1970 he was recommitted to probation. On November 2, 1972 another arrest warrant was issued for violation of probation, and on December 21, 1972 a supplementary report was filed alleging that defendant had been charged with rape, unlawful use of weapons, armed robbery, possession of a hypodermic needle, and further, that he was arrested while driving without a license.

A hearing was held on February 9, 1973 wherein a probation officer testified that for almost a year prior to the

issuance of the warrant, defendant had failed to report every month, as required.

Police Officer Pistello testified at the hearing that on December 10, 1971 defendant was arrested while driving at night without headlights. When stopped, he could not produce a license. A search of defendant revealed two shotgun shells and, when one of the officers looked into the car, he found a sawed-off shotgun in the back seat. Defendant was charged and tried for unlawful use of weapons but was acquitted. However, one of his companions accompanying him that night pleaded guilty to the same charge. No evidence was introduced regarding the alleged rape, armed robbery and possession of a hypodermic needle. It was stipulated that Pistello's partner, Officer Guiney, if called, would substantially corroborate the testimony of Pistello.

Defendant admitted his failure to report subsequent to January, 1972, but stated he was unable to do so because he was in jail from early in February, 1972 until October 10, 1972 on the shotgun charge concerning which he was subsequently acquitted.

After considering the testimony and arguments on both sides the court, following the State's recommendation, revoked defendant's probation and, after a hearing in aggravation and mitigation, sentenced him to a term of not less than three years nor more than ten years in the penitentiary. During the hearing in aggravation and mitigation, the trial court asked defendant whether his parents were separated. Further, the court inquired of counsel whether defendant had told him he did not have a driver's license, to which counsel stated, "He is not denying that he didn't do it, that he didn't report, and, of course, he didn't deny he wasn't in the car."

Defendant first contends the court violated due process by revoking his probation for the commission of uncharged traffic offenses and involvement with an unlawful use of weapons charge, of which he had been found not guilty.

As a general rule, the trial court in its sound discretion

determines whether to revoke probation, and only an abuse of discretion gives rise to a reversal of the revocation. (People v. Sims, 32 Ill.2d 591, 208 N.E.2d 569; People v. Newton, 18 Ill.App.3d 180, 309 N.E.2d 779.) The court at any time prior to the expiration of the probationary period may revoke probation if it finds that the offender has violated a condition of probation. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(e).) One condition is that probationer not violate any criminal statute of any jurisdiction. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-3(a)(1).) The state need prove violations of probation conditions only by a preponderance of the evidence. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(c); People v. Crowell, 53 Ill.2d 447, 292 N.E.2d 721.) Neither is it necessary that a probationer be indicted, prosecuted or convicted of an offense for such offense to constitute a violation of the terms of probation. (People v. Johnson, 12 Ill.App.3d 511, 299 N.E.2d 545; People v. Sluder, 107 Ill.App.2d 177, 246 N.E.2d 35.) However, once a party has been tried and acquitted of a charge, that charge may not later be used as the basis for a revocation of probation since, though involving different standards of proof, the state is collaterally estopped from relitigating the issue. People v. Grayson, 58 Ill.2d 260, 319 N.E.2d 43.

In People v. Dotson, 111 Ill.App.2d 306, 250 N.E.2d 174, a proceeding for probation revocation was commenced predicated upon the charge of driving without a license. Noting that the revocation of probation is discretionary, the appellate court upheld the revocation, stating at page 310:

"In view of the evidence of violations of the Drivers License Act, c 95-1/2, § 6, Ill Rev Stats 1965, the court did not abuse its discretion in ordering the revocation of probation."

We note that the offense of driving without a license is a Class A misdemeanor (Ill. Rev. Stat. 1973, ch. 95-1/2, par. 6-601(c)) and, as such, constitutes a violation of a "criminal statute" justifying revocation of probation. (Ill. Rev. Stat.

1973, ch. 38, par. 1005-6-3(a)(1).) Thus, we believe this charge in and of itself was sufficient to justify the action of the trial court in revoking the defendant's probation. We believe it is therefore unnecessary to discuss the sufficiency of any other charges against the probationer.

Defendant further contends the court maintained a "prosecutorial role" in questioning.

Although the trial judge should never become an advocate, as a seeker of the truth he may make pertinent inquiries for the purpose of eliciting the truth and to bring enlightenment on material issues in the cause. People v. Trefonas, 9 Ill.2d 92, 136 N.E.2d 817; People v. Rogers, 18 Ill.App.3d 940, 310 N.E.2d 854.

By questioning defense counsel concerning defendant's possession of a driver's license and by questioning defendant concerning his parents' marital status, it is clear the trial court was attempting to clarify and bring enlightenment on material issues. The questioning by the trial court during the hearing on aggravation and mitigation was proper, did not constitute an abuse of discretion, and therefore did not deny defendant a fair hearing and effective assistance of counsel.

Finally, the defendant argues and the state concedes that credit should have been considered for time served on probation, since the sentence was imposed on February 9, 1973, following the January 1, 1973 effective date of section 5-6-4(h) of the Unified Code of Corrections. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(h).) The State, however, asserts that the section has been amended by P.A. 78-939, effective July 1, 1974 (Ill. Const. 1970, art. IV, §10; People v. Goetz, 27 Ill.App.3d 680, 327 N.E.2d 516) to the effect that the credit shall be allowed "unless the court orders otherwise." Therefore, they contend that the matter should be remanded for the judge to rule whether, in his discretion, credit should be given.

This very issue was ruled on recently in People v. Fitzgerald, 25 Ill.App.3d 973, 324 N.E.2d 13. There, the order

revoking probation and the sentence were entered on April 3, 1973, after the effective date of the Unified Code of Corrections but before the effective date of the amended section 5-6-4(h). No credit was given for time served on probation. An appeal followed and the identical argument presented here by the State was rejected, the court holding that the trial court had an obligation to so credit the defendant at the date of sentencing.

Likewise, in People v. Goetz, supra, defendant admitted a violation of probation and was sentenced on January 17, 1974. No credit was given for time spent on probation. Even though the decision on appeal (April 24, 1975) was after the effective date of the amendment, the court held at page 683:

"The defendant in the instant case was sentenced following the revocation of probation on January 17, 1974. At the time of sentencing then the trial court did not have authority to deny credit for time spent on probation and erred in so doing."

We therefore affirm the judgment of the trial court and remand the cause with directions to the trial court to determine the amount of credit for time served on probation due defendant and to issue an amended mittimus reflecting that determination.

Affirmed and remanded with directions as stated in this opinion.



30
311.A. 245



No. 61038

PEOPLE OF THE STATE OF ILLINOIS,))
))
Plaintiff-Appellee,))
))
v.))
))
MICHAEL SMITH, otherwise called))
VINCENT L. Mc HAFHEY,))
))
Defendant-Appellant.))

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
LOUIS B. GARIPPO,
PRESIDING.

BEFORE Barrett, P.J., Lorenz and Sullivan, JJ.

PER CURIAM (First District, Fifth Division)

Defendant was found guilty after a bench trial of the crime of burglary (Ill. Rev. Stat. 1973, ch. 38, par. 19-1.) and sentenced to a term of one to four years.

Defendant wished to appeal and the State Appellate Defender was appointed to represent him. After examining the record, the State Appellate Defender has filed a motion in this court for leave to withdraw as counsel on appeal. The motion is supported by a brief pursuant to the requirements of Anders v. California, 386 U.S. 738. The brief states that the only possible issues which could be raised on appeal are that the indictment charging defendant was fatally defective and that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The brief concludes that an appeal on these issues would be totally frivolous and without merit. Copies of the motion and brief were mailed to defendant and he was informed that he had until July 8, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

At trial William Y. Browne testified that he is the president of Reilly-Browne, Inc., a real estate and property management company and that at 5:00 P.M. on April 25, 1973, he left the company office at 658 East 63rd Street, Chicago, Illinois. At that time all the doors and windows were locked and barred. On April 26, 1973, at 7:30 A.M. when he returned to the company office he observed that the lower wire grill on the rear door had been bent upward several feet off the ground

and that the board over the front window had been broken off. He further testified that he did not give anyone permission to enter or remain in his establishment.

Gregory Janicki, a Chicago police officer, testified that on April 26, 1973, at approximately 6:45 A.M., he responded to a call of a burglary in progress and proceeded to 658 East 63rd Street, Chicago, Illinois, where he observed that a board which had been over the front window had been pulled away. He looked into the window and observed the defendant standing behind a counter inside the office. Defendant looked in his direction and then started to go toward the back door. Officer Janicki went around to the rear of the premises and observed that Officer Bluett had defendant in custody.

Edward Bluett, a Chicago police officer, testified that on April 26, 1973, at approximately 7:00 A.M., he received a call of a burglary in progress and proceeded to 658 East 63rd Street, Chicago, Illinois. He looked into the office and observed defendant standing behind a counter in the rear of the store. Officer Bluett went to the rear of the store and observed defendant run through the rear door. He then placed defendant under arrest. Officer Bluett further testified that an examination of the rear door of the premises revealed that the wire mesh of the screen had been pried up several feet off the ground.

Defendant testified that on April 26, 1973, at approximately 7:00 A.M., he was talking to a friend in the alley behind the Reilly-Browne realty office when the police placed him under arrest. Defendant denied committing the burglary.

The first possible argument which could be raised on appeal is that the indictment charging defendant with burglary was fatally defective because it did not contain the street address of the burglarized premises. The rule is well established that an indictment charging burglary need not give the specific street address of the property alleged to have been burglarized. An indictment is sufficient if it alleges that the offense was committed on a certain date and within a certain county. (People v. Reed, 33 Ill. 2d 535, 213 N.E.2d 278.) In the case at bar,

the indictment alleged that defendant committed the crime of burglary on April 26, 1973, in that within Cook County he knowingly and without authority entered the building of Reilly-Browne, Inc., a corporation, with the intent to commit the crime of theft therein. The indictment was clearly sufficient to charge defendant with the crime of burglary.

The second possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. In a bench trial, the credibility of witnesses is for the trial judge to determine and his determination will not be disturbed on appeal unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363.

In the case at bar, the testimony of Browne established that during the early morning hours of April 26, 1973, the office of the Reilly-Browne real estate company, of which he is president, was burglarized. Chicago Police Officers Janicki and Bluett testified that they responded to a call of a burglary in progress and proceeded to the Reilly-Browne real estate office. There, both officers observed defendant inside the office. Defendant was placed under arrest as he attempted to flee out the rear door of the office which had been forced open. This evidence was clear, convincing and sufficient to establish defendant's guilt beyond a reasonable doubt.

After an independent examination of the record, we concur in the opinion of the State Appellate Defender that none of the arguments thus raised has substantial merit. Nor does our examination of the record disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the motion of the State Appellate Defender to withdraw as counsel on appeal is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

[PUBLISH ABSTRACT ONLY.]

311A, 303³⁰



61383

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
CLAUDE ELLIS,	)	HONORABLE
	)	IRWIN COHEN,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM (First District, First Division).

Before BURKE, P.J., GOLDBERG, J. and EGAN, J.

Claude Ellis, defendant, was found guilty after a bench trial of the crime of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card. (Ill.Rev.Stat. 1973, ch. 38, pars. 24-1(a)(10) and 83-2(a).) He was sentenced to a term of four months in the House of Correction on each charge, the sentences to run concurrently.

Defendant wished to appeal and the public defender of Cook County was appointed to represent him. After examining the record, the public defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are: (1) that defendant did not knowingly and understandingly waive his right to a trial by jury, (2) that defendant's arrest was illegal, and (3) that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Copies of the motion and brief were mailed to the defendant on April 30, 1975. He was informed that he had until June 23, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

At trial, Chicago Police Officer Ron Amata testified that on November 26, 1974, at approximately 9:20 p.m., he and his partner were on patrol in search of a man who had fired shots at several

people approximately half an hour earlier. The man was described as a male Negro, 18 to 20 years old, wearing dark clothing and a black coat. At 816 South Sacramento, Officer Amata observed the defendant standing on the corner. The defendant was wearing a black leather jacket and dark brown pants. As the squad car pulled up, the defendant ran around the corner into the hallway which was well lit. Officer Amata testified that as he was exiting his squad car, he observed the defendant placing a gun behind the door inside the hallway. At this time Officer Amata was approximately 20 feet from the defendant. Officer Amata walked toward the doorway and the defendant ran upstairs. Officer Amata picked up the revolver dropped by the defendant and followed the defendant to the third floor landing where he was placed under arrest. The weapon recovered was a .38 caliber revolver containing five .38 caliber live cartridges. After defendant was given his constitutional Miranda warnings, he stated that the reason he had the gun was that earlier that day one of his brothers had been assaulted. Officer Amata asked defendant for his Illinois State Firearm Owner's Identification Card, but the defendant was unable to produce a card.

Defendant testified that on November 16, 1974, at approximately 9:45 p.m., he was in his apartment at 816 South Sacramento, Chicago, Illinois. Defendant stated that he had a fight with his wife and was going over to his mother's house. As he came down to the second floor he was approached by two officers who placed him under arrest. Defendant stated that he did not see a gun until he was placed in the squad car. Defendant denied possessing a gun on the evening in question.

The first possible argument which could be raised on appeal is that the defendant did not knowingly and understandingly waive his right to a trial by jury. There is no precise formula for determining whether a defendant's waiver of the right to a jury trial is knowingly and understandingly made. (People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453.) Each case depends upon the particular facts



and circumstances of that case. (People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite for the validity of that waiver. People v. Bradley, 131 Ill.App.2d 91, 266 N.E.2d 469.

In the case at bar, the record reflects that prior to trial, the trial judge asked the defendant if he wished a jury trial or a bench trial. Defendant replied that he wanted a bench trial. The trial judge informed the defendant that once he waived his right to a trial by jury he could not later ask for a jury trial. The trial judge also explained that a jury trial entailed 12 people who would be chosen to hear all the evidence in the case. After all of these admonishments the defendant persisted in his request for a bench trial which was then granted. Under these facts we conclude that the defendant knowingly and understandingly waived his right to a trial by jury.

The second possible argument which could be raised on appeal is that defendant's arrest was illegal in that the police lacked probable cause. A police officer may make an arrest without a warrant if he has reasonable grounds to believe that an offense has been committed and that the defendant is the man who committed the offense.

(People v. Wright, 42 Ill.2d 457, 248 N.E.2d 78.) Probable cause to make an arrest constitutes something less than the evidence needed for a conviction. The existence of probable cause which would justify an arrest without a warrant depends upon the factual considerations of everyday life upon which reasonable and prudent men, not legal technicians, must act. People v. Colbert, 10 Ill.App.3d 758, 295 N.E.2d 225; People v. Jones, 7 Ill.App.3d 820, 288 N.E.2d 918.

In the case at bar, Chicago Police Officer Amata testified that on November 26, 1974, he was searching for a man who had fired at several individuals. The man was described as a male Negro, 18 to 20 years old, wearing dark clothing and a black coat. Approximately half an hour after the shooting, in the vicinity of the shooting, Officer Amata observed the defendant standing on the street corner.

The defendant fit the description of the offender wanted in the shootings. When Officer Amata approached in his marked squad car, the defendant ran around the corner into a doorway. As Officer Amata was getting out of the squad car, he observed the defendant place a gun behind the door in a hallway. Officer Amata approached the hallway and the defendant ran up the stairs. After recovering the weapon Officer Amata placed the defendant under arrest on the third floor landing. Officer Amata's observation of the defendant, who fit the description of the man wanted in the shooting, placing the gun behind the door of the hallway was sufficient to establish probable cause for defendant's arrest. People v. Zazzetti, 6 Ill. App.3d 858, 286 N.E.2d 745.

The third possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The rule is well established that in a bench trial the credibility of witnesses is for the trial judge to determine and his determination will not be disturbed on review unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. (People v. Clark, 52 Ill.2d 374, 288 N.E.2d 363; People v. Holmes, 6 Ill.App.3d 254, 285 N.E.2d 561.) The testimony of a single witness is sufficient to sustain a conviction if positive and credible even though contradicted by the accused. People v. Abrams, 21 Ill.App.3d 734, 316 N.E.2d 5; People v. Garmon, 19 Ill.App.3d 192, 311 N.E.2d 299.

In the case at bar, the testimony of Chicago Police Officer Amata established that in searching for a person wanted for a shooting, he observed the defendant standing on the street. As Officer Amata drove up in his marked police vehicle, the defendant ran around the corner into a hallway. Officer Amata at that time observed the defendant place a gun behind the door of the hallway. As Officer Amata approached, the defendant fled up the stairway. Officer Amata recovered the weapon and followed the defendant up to the third floor landing where he was placed under arrest. After being warned of his constitutional Miranda

rights, the defendant admitted possession of the weapon. Defendant's testimony at trial in which he denied the offense does not create a reasonable doubt as to his guilt since the trial judge is not obliged to believe a defendant's testimony. (People v. Lahori, 13 Ill.App.3d 572, 300 N.E.2d 761.) Here the testimony of Chicago Police Officer Amata was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

After an independent examination of the record, we concur in the opinion of the public defender that as to the charge of unlawful use of weapons, none of the arguments thus raised have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal as to that charge which are also not frivolous.

In discharge of our responsibility under the Anders decision, we have independently reviewed the record in this case and have noted that as to defendant's conviction for a failure to possess an Illinois State Firearm Owner's Identification Card it could be successfully argued that the complaint was fatally defective in that it used the disjunctive term "or" and was therefore uncertain. The complaint charged that the defendant committed the offense of failure to possess an Illinois State Firearm Owner's Identification Card "in that he knowingly possessed a firearm or firearm ammunition * * * ."

In People v. Abrams, 21 Ill.App.3d 734, 316 N.E.2d 5, the defendant was convicted of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card. On appeal defendant argued that the complaint which charged him with failure to possess an Illinois State Firearm Owner's Identification Card was fatally defective in that it alleged that he "knowingly acquired or possessed any firearm or firearm ammunition * * * ." This court reversed defendant's conviction holding that the use of the disjunctive "or" rendered the complaint uncertain and the complaint was therefore void.

In the case at bar the complaint charging the defendant with failure to possess an Illinois State Firearm Owner's Identification

Card is, in pertinent part, identical to the complaint which was held insufficient in the Abrams case. Defendant's conviction on that charge cannot stand.

Accordingly, defendant's conviction on the charge of failure to possess an Illinois State Firearm Owner's Identification Card is reversed. As to the charge of unlawful use of weapons, the public defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED IN PART;
REVERSED IN PART.

ABSTRACT ONLY.

311.A. 319^{3D}✓



No. 60464

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
STEPHEN TURNER,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant, Stephen Turner, was indicted for aggravated battery. After a bench trial he was convicted of that crime and sentenced to a term of one and one-half to four and one-half years. On appeal, defendant argues that he was denied his constitutional right to effective assistance of counsel; that the trial court erred in the admission of certain evidence; and that defendant's accountability for aggravated battery was not proved beyond a reasonable doubt.

The incident in question occurred shortly after 10:00 p.m. on August 29, 1972 in the City of Chicago. Alton Shears was shot in the leg as he and his cousin, Cynthia Timms, were walking down the street towards their home. A person known as "Blood" did the shooting.

Alton Shears, sixteen years old at the time of trial, testified that when he and his cousin were several houses away from their home, they noticed defendant and Blood approaching on the same side of the street. Blood was walking in line toward Shears and defendant was walking toward Cynthia. Shears had been in a fist fight with Blood earlier in the day and, wishing to avoid another fight, directed Cynthia to change places with him on the sidewalk. Blood and defendant then changed positions so that Blood was again directly in front of Shears. As the parties passed each other, defendant grabbed Shears' cousin, held her, and then threw her into some bushes. Blood meanwhile stopped Shears, asked him if he wanted to fight, and placed a gun to his head. When Shears struck the gun and began running to his home, Blood fired three shots. Shears, hit twice in the left leg,



reached home and instructed his mother to call the police.

Cynthia Timms testified that defendant initiated the attack by grabbing her and putting his hand over her mouth. As Blood pulled the gun, defendant pushed her into the bushes and held her there until the shots were fired. Defendant and Blood then fled together down the street.

Defendant, testifying in his own behalf, denied participation in the shooting. He stated that he was walking with Blood. When Shears and his cousin came into view, Blood crossed the sidewalk and defendant moved out of the way to the other side. As the parties met, Blood stopped Shears and the two began arguing. At this point, Shears' cousin became hysterical and attempted to intervene in the quarrel. Defendant testified that he put his hand up to stop her and was attempting to calm her down when the shots sounded. Defendant pushed her out of danger into some bushes and ran alone from the scene. Defendant knew Blood and Shears had been feuding but did not know they had fought earlier in the day. He also denied knowing that Blood was carrying a gun.

Defendant initially contends that he was denied effective assistance of counsel at trial. Defendant maintains that his attorney failed to include certain persons in his list of witnesses; failed to move for a substitution of judges; failed to file pre-trial discovery motions; failed to make a timely motion for a mistrial; and failed to advise him of his right to a jury.

Although defendant is entitled to a fair trial, due process does not require that the proceedings be perfect or that trial counsel be infallible. (People v. Rogers (1974), 23 Ill.App.3d 115, 318 N.E.2d 715.) In order to substantiate a claim of ineffective assistance of counsel, whether appointed or privately retained, a convicted defendant must establish that defense counsel was actually incompetent and, as a result, defendant suffered substantial prejudice, without which the outcome of the trial probably would have been different. (People v. Casillas (1975), 27 Ill.App.3d 73, 326 N.E.2d 537 (abstract); People v. Ortiz (1974),



22 Ill.App.3d 788, 317 N.E.2d 763.) As we stated in Ortiz, this standard properly reflects the constitutional requirement of adequate representation and there is no need for Illinois courts to adopt the federal standard of "reasonably competent representation," as urged by defendant. (See United States v. De Coster (D.C. Cir. 1973), 487 F.2d 1197.) Under the foregoing criteria, an examination of the record shows that defendant was rendered effective assistance of counsel in the present case.

Defendant first complains of counsel's failure to include the names of certain police officers in his list of witnesses, with the result that the court precluded the defense from calling the officers as witnesses. From defense counsel's statements at trial, it appears that the officers' testimony would have been offered to impeach certain statements made by Shears. The record indicates, however, that the discrepancies defendant wished to bring forth were of a minor nature and did not affect the witness' account of defendant's part in the offense. Such impeachment testimony would have been of minimal value to the defense and its exclusion does not sustain a claim of substantial prejudice.

Defendant next urges that defense counsel was incompetent for failing to move for a substitution of judges when the case was assigned to a judge who had previously convicted defendant and placed him on probation. The record reveals, however, that the trial judge was unaware of defendant's prior conviction until the hearing on aggravation and mitigation. After learning of the prior conviction, the trial judge imposed a moderate sentence. Defense counsel's failure to move for substitution of judges was in no way prejudicial to defendant.

Defendant also claims that defense counsel's failure to move for pre-trial discovery of police reports and grand jury minutes resulted in an abrogation of his right to confront and cross-examine witnesses.

The record does not support defendant's claim that his counsel was unprepared. On the contrary, defense counsel conducted



a thorough cross-examination of prosecution witnesses and introduced testimony of defendant which, if believed, would have required his acquittal. Under these circumstances, it cannot be said that defendant was substantially prejudiced by counsel's failure to move for pre-trial discovery of police reports and grand jury minutes. See People v. Hawkins (1974), 23 Ill.App.3d 758, 320 N.E.2d 90; People v. Travis (1973), 10 Ill.App.3d 714, 295 N.E.2d 325.

Defendant next contends that his counsel rendered ineffective assistance by failing to request a mistrial when the State failed to produce a statement purportedly signed by Shears and given to the police. Shears referred to such a document, but the prosecutor stated that he had never seen such a statement and, to his knowledge, the instrument did not exist. It was further suggested that the document referred to by Shears was a complaint signed by him against defendant. In any event, counsel's decision to refrain from moving for a mistrial is a matter of trial strategy and is not evidence of incompetency. See People v. Towers (1974), 17 Ill.App.3d 467, 308 N.E.2d 223.

Defendant finally offers his attorney's failure to advise him of his right to a jury as evidence of counsel's incompetency. The record discloses that the trial judge fully informed defendant of his right to a jury before the commencement of trial. At that time defendant indicated that he understood the right but wished to waive it. Defendant cannot claim any prejudice, even if his counsel did not advise him of his right to a jury trial.

Defendant's second contention is that the trial court committed reversible error by allowing the introduction of evidence that at the time of his arrest he possessed a gun and was charged with unlawful use of a weapon. Defendant maintains this matter was wholly unrelated to the crime charged and so prejudicial as to require a new trial.

Defendant was arrested on the evening of the crime while a passenger in a vehicle. During cross-examination defendant denied possessing a gun on the day of the occurrence or at the time of his

arrest. When questioned concerning his arrest, he was asked if anything was thrown from the vehicle. He replied, "Yes, a half bottle of vodka." Over the objection of defense counsel, the prosecutor read portions of the preliminary hearing transcript to show that a gun, not a bottle, had been thrown from the vehicle and that defendant had been charged with unlawful use of a weapon.

The general rule is that evidence concerning another crime committed by the accused must be excluded when independent of or unrelated to the crime with which he is charged. (People v. Whitley (1974), 13 Ill.App.3d 995, 311 N.E.2d 282.) It is equally well-settled that evidence of the commission of other crimes by the accused is permitted if relevant to establish identity, design, motive, intent or common scheme when these matters are in issue. People v. Butler (1971), 133 Ill.App.2d 299, 273 N.E.2d 37.

We believe that the evidence of the possession of the gun and weapons charge was inadmissible under the general exclusionary rule. However, in our view, its introduction in the present case does not require reversal of defendant's conviction. The admission of improper evidence which would be considered prejudicial in a jury trial will not be considered prejudicial in a bench trial unless it affirmatively appears that the trial judge relied on the incompetent evidence in reaching judgment. (People v. Partee (1974), 17 Ill. App.3d 166, 308 N.E.2d 18; People v. Jackson (1968), 95 Ill.App.2d 193, 238 N.E.2d 196.) Here, there is nothing in the record to indicate that the trial judge considered the challenged evidence in arriving at his decision, and its admission could not be grounds for reversal.

Defendant finally contends that his accountability for the aggravated battery was not proved beyond a reasonable doubt.

In order to sustain a conviction based on accountability, the evidence must show that defendant solicited, aided, abetted, agreed, or attempted to aid another in the planning of an offense; that his participation took place during the commission of the crime; and that his participation was with the concurrent specific intent

to promote or facilitate the offense. (People v. Gilliam (1974), 16 Ill.App.3d 659, 306 N.E.2d 352; People v. Ramirez (1968), 93 Ill.App.2d 404, 236 N.E.2d 284.) Criminal intent, however, may be proved by circumstantial evidence. (People v. Olson (1971), 3 Ill.App.3d 240, 278 N.E.2d 861.) The finder of fact may properly infer intent from the acts and conduct of defendant which, in light of other facts in evidence, would reasonably indicate such an intent to the minds of others. People v. Haycraft (1972), 3 Ill.App.3d 974, 278 N.E.2d 877.

Here, defendant accompanied Blood to the scene of the crime and switched places with Blood as they approached the victim. The State's witnesses testified that defendant initiated the attack by grabbing the victim's cousin and that he held her down while Blood shot the victim. Both witnesses also testified that defendant fled with Blood. Under those facts and circumstances, the finder of fact could properly conclude that defendant had the intent to promote the crime and did, in fact, aid in its commission. The finding of the trial court is amply supported by the evidence notwithstanding the testimony of defendant which, if believed, would negate the inference of intent. Where a jury has been waived, the trial judge must determine the credibility of all witnesses and the weight to be given their testimony. The decision of the trial court in the present case will not be disturbed.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON, P.J., and MEJDA, J., concur.



to promote or facilitate the offense. (People v. Gilliam (1974), 16 Ill.App.3d 659, 306 N.E.2d 352; People v. Ramirez (1968), 93 Ill.App.2d 404, 236 N.E.2d 284.) Criminal intent, however, may be proved by circumstantial evidence. (People v. Olson (1971), 3 Ill.App.3d 240, 278 N.E.2d 861.) The finder of fact may properly infer intent from the acts and conduct of defendant which, in light of other facts in evidence, would reasonably indicate such an intent to the minds of others. People v. Haycraft (1972), 3 Ill.App.3d 974, 278 N.E.2d 877.

Here, defendant accompanied Blood to the scene of the crime and switched places with Blood as they approached the victim. The State's witnesses testified that defendant initiated the attack by grabbing the victim's cousin and that he held her down while Blood shot the victim. Both witnesses also testified that defendant fled with Blood. Under those facts and circumstances, the finder of fact could properly conclude that defendant had the intent to promote the crime and did, in fact, aid in its commission. The finding of the trial court is amply supported by the evidence notwithstanding the testimony of defendant which, if believed, would negate the inference of intent. Where a jury has been waived, the trial judge must determine the credibility of all witnesses and the weight to be given their testimony. The decision of the trial court in the present case will not be disturbed.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McGLOON, P.J., and MEJDA, J., concur.



NO. 60806

CHICAGO TITLE AND TRUST COMPANY, a)
 Corporation of Illinois, as Trustee)
 under Trust Agreement dated January 12,)
 1967, known as Trust Number 50199;)
 DEMITRIOS LOUKAS, LARRY TRAVILAS,)
 LOUIS R. DeMICHELE and RUTH DeMICHELE,)
 Trustees under Trust Agreement dated)
 August 31, 1965,)

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY.

Plaintiffs-Appellants,)

v.)

THOMAS Z. ROBAKIS and EUGENEA ROBAKIS;)
 EDWARD PACHNIAK; LORRAYNE B. PACHNIAK;)
 BURTON DEX; GENEVIEVE DEX; ANTHONY)
 J. PIENKOWSKI; HARRIET PIENKOWSKI;)
 KENNETH J. IWANICKI; CHARLES MOLNAR;)
 MATILDA MOLNAR; GUY PEOTA; JOSEPHINE)
 M. PEOTA; JOSEPH OLMA; HENRIETTA OLMA;)
 IGNATIUS BURA; HELEN BURA; and PIONEER)
 TRUST AND SAVINGS BANK, as Trustee,)
 under Trust Number 14030,)

HONORABLE
 NATHAN M. COHEN,
 PRESIDING.

Defendants-Appellees.)

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

Plaintiffs' second amended complaint seeks injunctive relief against defendants' interference with their alleged right of access upon and across certain portions of contiguous parcels of real estate owned or otherwise possessed by the parties in the city of Chicago. A dispute has apparently arisen concerning plaintiffs' use of those portions of the property for alley and driveway purposes, which have been barricaded by the defendants. Plaintiffs claim their right of access over those portions of the property through easement by deed and easement by prescription. Some of the defendants named in the second amended complaint filed no answers thereto.

The case was set for trial for June 10, 1974, on which date plaintiffs' counsel orally moved for a voluntary dismissal

of the action without prejudice pursuant to section 52 of the Civil Practice Act; the motion was later that same day reduced to writing. (Ill.Rev.Stat. 1973, ch. 110, par. 52.) Counsel for several of the defendants opposed the motion. The section 52 motion was denied on June 12, 1974, and plaintiffs' action was dismissed with prejudice and without costs to any party.

Plaintiffs prosecute this appeal, contending that they were entitled to a voluntary dismissal without prejudice as a matter of right since their motion was made before trial or hearing commenced in the action and since section 52 was otherwise complied with as to notice and tender of costs.

Defendants have filed no appearance or brief on this appeal. Under such circumstances this court may, in its discretion, reverse the judgment pro forma, or may proceed to a resolution of the case on its merits. Matters to be considered in determining whether the case will be reversed pro forma or will be resolved on its merits are the effects of this court's decision upon the public and upon the parties to the action, in light of the fact that the questions presented are not fully briefed. People v. Jones, 8 Ill.App.3d 849, 291 N.E.2d 305; People v. Haaser, 28 Ill.App.3d 809, ____ N.E.2d ____; Algozino v. Police Board of the City of Chicago, 111 Ill. App.2d 34, 249 N.E.2d 720; Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App.2d 264, 254 N.E.2d 814.

The following matters appear from plaintiffs' memorandum in support of the section 52 motion and defendants' affidavit in opposition thereto, and from the arguments of counsel during the hearings held on June 10 and 12, 1974; the transcripts of two hearings, held on June 10th and 11th, are not included in the instant record. (Glover v. Glover, 24 Ill.App.3d 73, 320 N.E.2d 513.) When the case was called for trial on the

morning of June 10th, a Monday, plaintiffs' motion for a continuance was denied and the cause was recessed until 2:00 that afternoon for presentation of opening statements. At the afternoon session plaintiffs' counsel orally moved for a voluntary dismissal of the action without prejudice pursuant to section 52 of the Civil Practice Act, stating that he had tendered defendants their costs of the action and that no counterclaims had been filed in the suit. The basis of the motion was that defense counsel had failed to comply with an April 8, 1974 order to produce all documents concerning acquisition of the real estate; that defense counsel, during the week preceding June 10, 1974, advised plaintiffs' counsel that he would secure a continuance from the June 10th trial date and would produce the title documents on June 10th; that on the Friday preceding the Monday on which the case was to be called for trial defense counsel advised plaintiffs' counsel that the court refused to allow a continuance; that defense counsel answered ready for trial on June 10th and produced the title documents; that plaintiffs' counsel was taken by surprise; and that the title documents which were produced on June 10th were voluminous and would require additional discovery, for which as long as two months might be required. The trial court extended to plaintiffs the option of accepting a "weekly status" continuance, rather than the two months as requested, or of standing on the section 52 motion. The trial court observed that the section 52 motion was orally presented, that no proper notice thereof had been served upon defendants, that the motion "came too late," and that there had already been a hearing in the case; with respect to the latter comment by the trial court, plaintiffs' counsel explained that the hearing had been in connection with a motion for a temporary restraining order, which had been denied.

A determination of the instant case on its merits would entail resolution of several questions briefed by only one side on this appeal: the sufficiency of the section 52 motion, the sufficiency and timeliness of the notice of that motion, whether plaintiffs were entitled to a voluntary dismissal as a matter of right, whether there had been a hearing or the trial commenced in the matter, and the like. (Shady v. Shady, 10 Ill.App.3d 801, 806, 295 N.E.2d 130 [lv. to app. den. 54 Ill.2d 596]; Gilbert-Hodgman, Inc. v. Chicago Thoroughbred Enterprises, Inc., 17 Ill.App.3d 460, 308 N.E.2d 164; Bauman v. Advance Aluminum Castings Corp., 27 Ill.App.2d 178, 169 N.E.2d 382; Central Ice Cream Co. v. Goldenrod Ice Cream Co., 18 Ill.App. 2d 7, 151 N.E.2d 466; Circuit Court Rule 2.1.) Resolution of the instant issues by this court could have precedential effect since there appears to exist no authority approaching the circumstances of the instant case. This court has the benefit of but a single brief on this appeal and we are therefore reluctant to dispose of the case on its merits.

Although the record does not contain the transcripts of the hearings held on the mornings of June 10th and June 11th, we have reviewed the record and it does not appear that those transcripts would have been necessary to a determination of the appeal on its merits. Glover v. Glover, 24 Ill.App.3d 73, 320 N.E.2d 513; Robinson v. Moore, #60912, July 15, 1975.

Defendants have not seen fit to appear in this court and defend the action of the trial court dismissing the cause with prejudice. We therefore reverse pro forma the order of the trial court denying plaintiffs' section 52 motion and dismissing their action with prejudice, and remand the cause with directions to allow plaintiffs' section 52 motion for a voluntary dismissal of the action without prejudice.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.



30
311A. 358

No. 61302

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellant,)
)
 v.)
)
JOHN NELSON,)
)
 Defendant-Appellee.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
ARTHUR HENKEN,
PRESIDING.

PER CURIAM: First District, Fifth Division.

BEFORE Barrett, P.J., Lorenz and Sullivan, JJ.

Plaintiff, the People of the State of Illinois, appeals from an order of the circuit court dismissing its complaint, charging defendant with the crime of criminal housing management. Ill. Rev. Stat. 1973, ch. 38, par. 12-5.1.

On April 25, 1974, prior to a jury selection, defendant made oral motions to dismiss the complaint on the basis of the unconstitutionality of the statute because of lack of standards and vagueness, but did not question the signature or verification of the complaint. A jury was then selected and on April 26, 1974, the State produced the testimony of five witnesses. After the State rested its case in chief, defendant moved to dismiss the complaint based upon the fact that the complaint was not properly verified in that it was not dated and did not contain the seal of the court clerk. After hearing arguments of counsel and the testimony of the court clerk who signed the complaint the trial court granted defendant's motion and dismissed the complaint. The State appeals from the order of dismissal.

We have noted that the appellee has not filed a brief in this court as required by Supreme Court Rule 341. (Ill. Rev. Stat. 1973, ch. 110A, par. 341.) Under these circumstances this court may in its discretion determine the case on its merits or may reverse pro forma without further consideration or discussion. (People v. Rincon, 26 Ill. App. 3d 842, 326 N.E.2d 142.) In the exercise of our discretion, we have elected to consider this case on its merits.

Plaintiff argues that the trial court erred in dismissing the complaint because the defendant had waived his right to object to the lack of verification in the complaint by failing to raise the issue prior to trial. In People v. Smith, 90 Ill. App. 2d 388, 234 N.E.2d 161, the defendant was convicted of the crime of theft. After the State presented its case in chief, the defendant moved to quash the complaint on the ground that the complaint was not properly verified. The motion was denied and on appeal defendant argues that the complaint was fatally defective. This court rejected defendant's contention holding that defendant's action in failing to move to quash the complaint until after the State had rested its case constituted a waiver of any defects which existed in the verification of the complaint. See also People v. Childress, 2 Ill. App. 3d 319, 276 N.E.2d 360.

In the case at bar the defendant failed to challenge the verification of the complaint until after the State had rested its case in chief. Defendant's action in proceeding to trial without making a motion to quash the complaint constituted a waiver of any defects which existed in the verification of the complaint. The trial court therefore erred in dismissing the complaint.

The order of the circuit court dismissing the complaint is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

[PUBLISH ABSTRACT ONLY.]

Before BARRETT, P.J., DRUCKER, J. and SULLIVAN, J.
PER CURIAM: (First District, Fifth Division)

1/ It stated that after he had studied the petition, consulted with petitioner, and examined the trial proceedings, he felt it unnecessary to amend or change the petition.

stated there had been a pretrial conference with the State and, as a result, petitioner wished to enter a plea of guilty only as to the three charges of armed robbery, with the rape charge to be dropped. When the State disagreed, another conference between defense counsel and the Assistant State's Attorney was held, and the latter voiced his belief that the case could not be disposed of, and he suggested a continuance. After a short recess, defense counsel informed the court that petitioner would enter a plea of guilty to all four charges in the indictment. The trial judge, in admonishing petitioner, advised him that he was charged with one count of rape and three counts of armed robbery and informed him of the possible statutory penalties for each of the four crimes charged. The trial judge further told the petitioner that by entering a plea of guilty, he would waive his right to a trial by jury and his right to a bench trial. Petitioner then stated that no duress or force had been used to coerce him to enter the plea of guilty and that he did so voluntarily, after having talked to his father (who was present in open court.) Thereafter, the facts which provided a basis for the indictment were stipulated to by the parties and a finding of guilty as to the count of rape and the three counts of armed robbery was entered. Prior to imposing sentence, in answer to a specific question by the trial judge, petitioner stated that he had nothing further to say.

As a general rule, nonmeritorious post-conviction petitions may be dismissed without a hearing on the basis of what is contained in the petition and what is revealed in the record of the trial or other proceedings. (People v. Spicer, 47 Ill.2d 114, 118, 264 N.E.2d 181; People v. Morris, 43 Ill.2d 124, 251 N.E.2d 202.) Where the record indicates a lack of merit to a claim that a plea of guilty was improperly obtained, the petition may be dismissed without a hearing. (Morris, supra.) Here, the transcript concerning the guilty plea contradicts petitioner's present contention that his plea was not voluntary in that he was under the belief that the rape charge would be dropped. When the case was recalled

after a conference between petitioner and his counsel, the latter (in petitioner's presence) informed the trial judge that petitioner wished to enter a plea of guilty to all four charges in the indictment. The trial judge, in admonishing the petitioner, specifically informed him that he was charged with one count of rape and three counts of armed robbery and advised him of the possible statutory penalties for each of the four crimes charged. The stipulated facts demonstrated guilt on all four charges. After the guilty finding on all charges, when inquiry was made by the court before sentencing, petitioner stated that he had nothing to say.

In view of the foregoing, we think that petitioner's present argument that his plea of guilty was not voluntarily entered is contradicted by the transcript of proceedings at the hearing on the plea. Thus, petitioner's allegation is insufficient to require an evidentiary hearing under the Illinois Post-Conviction Hearing Act. See People v. Spicer, supra; People v. Pineda, 9 Ill.App.3d 1014, 293 N.E.2d 650.

We agree, however, with petitioner that appointed counsel in the post-conviction proceedings should have amended the pro se post-conviction petition. (See People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566.) This leads us to the question of whether counsel's failure to so amend constitutes reversible error. Petitioner argues the amendment should have been made to demonstrate his claim that his plea of guilty was involuntary because he was under the belief that the rape charge would be dropped. However, as we have noted above, this contention is contradicted by the trial record and was insufficient to require an evidentiary hearing. In addition, we note that trial counsel, at the hearing on the State's motion to dismiss the petition, did present this issue to the trial court and made an extensive argument citing portions of the transcript of petitioner's plea of guilty.

In view of the foregoing, we conclude that the failure of counsel to amend the petition did not deprive petitioner of any

constitutional right.

Accordingly, the judgment of the Circuit Court of Cook County, dismissing petitioner's pro se post-conviction petition, is affirmed.

Judgment affirmed.

NO. 74-198

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

317.A. 598V

FILED
AUG 12 1975

Fifth District of Illinois
CLERK AUGUST 12, 1975

PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the circuit court of
Plaintiff-Appellee,) Union County, Illinois.
vs.)
RAYMOND D. SEXTON,)
Defendant-Appellant.) Honorable George Oros,
Judge Presiding.

MR. PRESIDING JUSTICE JONES delivered the opinion of the court:

Following a bench trial, the defendant-appellant, Raymond Sexton, was convicted of the offense of involuntary manslaughter. The court sentenced him to three years on probation. On appeal the defendant raises the following issues: 1) whether he was proven guilty beyond a reasonable doubt; 2) whether the trial court erred in admitting evidence from which it could be inferred that the defendant had abused the deceased, two-and-one-half-year-old Matthew Holder.

On August 27, 1973, the defendant was charged with the murder of the deceased, his stepson. On September 7, 1973, the grand jury returned a bill of indictment. On October 31, 1973, the court granted the defendant's motion to dismiss. The State, however, was given leave to file an amended information. The defendant was recharged with the offense of involuntary manslaughter. On November 6, 1973, the defendant waived indictment and later waived his right to a jury trial.

At trial, the defendant testified that on the day in question, August 23, 1973, he came home from work and was caring for his wife's children while she was at work. About 5:00 p.m. the defendant let Matthew in the house to use the toilet. The defendant stated that he placed the boy on the toilet and later returned to check on him. He continued:

"I leaned him forward to see if he had used the restroom, and he hadn't and I swatted him on the rear* * *. He kind of stiffened up and jumped and fell forward on the tub."

The defendant said the child gave a small cry, became limp and began gasping. Thinking the boy was choking, the defendant attempted mouth

to mouth resuscitation. When this proved unsuccessful he asked a neighbor to call an ambulance. He told the ambulance attendants that Matthew was choking. He also explained to the attendants that Matthew's mother worked at Union County Hospital and that he would stay home to attend to the other child.

On cross-examination, the defendant testified that Matthew had appeared healthy prior to the incident. He related that he swatted the deceased because he thought the child was attempting to delay being bathed. He said he could not recall whether he had ever struck the boy prior to this occasion. He agreed that at the time he struck Matthew, the boy's legs were entangled in his pants. The defendant explained that the boy was balanced on the toilet in a precarious position. He reiterated that the tub was about two feet away from the toilet.

The State's first witness, Dr. William Whiting, testified that he examined Matthew Holder at 6:50 p.m. on August 23, 1973, at Union County Hospital. He stated that he found a small quantity of fresh blood in the child's mouth and several small marks on the left side of the neck in front. The child was unconscious. The doctor noticed that the child was paralyzed on the right side and that his eyes were not normal. From these observations, he concluded that the child might have suffered a head injury, which he diagnosed as a subdural hematoma due to trauma.

The doctor was allowed to testify that the child's mother told him she had been told her son had fallen while taking a bath at home. Over objection by defense counsel, the doctor also stated that the defendant's mother had called him. He explained that the step-grandmother told him that:

"The stepfather [the defendant] had been bathing the child* * * or had been taking care of the child and the stepfather [defendant] had placed the child on the toilet and that he picked the child up off the toilet and discovered that the child hadn't done what was expected and then struck the child from behind and that the child fell* * *and struck the bathtub."

Doctor Whiting ordered the child transferred to the neuro-surgical service at St. Louis Children's Hospital. He stated that he filed a report that he was "under the impression that there might have been child abuse" based upon the circumstances of Matthew's admission to the hospital and the severity of the injuries. The doctor explained that the mother had told him the child was not ill "as far as she knew." The witness said

it was probable that the boy died as a result of the injuries he observed. In his opinion the deceased died "because of subdural hematoma and the associated injury to the brain."

On cross-examination, Dr. Whiting stated that he was not present when the child died. He acknowledged that his opinion regarding the cause of death was based upon reports sent him by physicians at St. Louis Children's Hospital and upon the medical history and accounts of the circumstances of the child's injuries given by Matthew's mother and step-grandmother. He stated that the likelihood that the cause of the subdural hematoma was other than trauma was remote. The doctor explained that his diagnosis had been confirmed by the physicians at Children's Hospital. Dr. Whiting related that the neurosurgeon who treated the child reported injury to the brain in addition to the subdural hemotoma.

Mary Gilliam, the nurse who first attended Matthew when he arrived at Union Hospital, testified that the child was flaccid and unconscious. She noticed that his eyes were abnormal. She observed bruises on the child's forehead and neck. At the request of Matthew's mother she called Dr. Whiting.

Violet Solomon, who had been Matthew's babysitter, testified that she cared for the boy on August 22, 1973, the day before the incident in question. Matthew had stayed with her all night. She remembered seeing a bruise that looked like a hand print on the boy's face and neck that day. She said he had a headache and vomitted that afternoon. According to her testimony, the next morning Matthew ate a large breakfast and played with other children until his mother picked him up about 10:30. The witness related that she had seen bruises on the child on previous occasions, beginning in April 1973. She testified to seeing belt marks on the boy's back and bottom during this period. Prior to April of 1973 she had never observed marks on the child. On cross-examination the witness related that Matthew's mother had told her that "someone else" has put marks on the boy.

Cora Holder, Matthew's grandmother, testified that in June 1973 she took the deceased to a restaurant. There, she related, Matthew saw the defendant and became so upset that he asked to leave.

The State next called William Holder, the deceased's father. Holder testified that his son would start crying every time he was taken home

to his mother's trailer after a visit with him. He, too, had observed marks on his son's body after March 3, 1973. On one occasion he noticed bruises "all over his body, and [that] he had two streaks, behind, on his rear end, two sharp streaks across his rear end, and his body, his arms and legs, all had bruises on them." The deceased's father stated that he had not observed any marks prior to March 3, 1973.

Gayla Goins, a thirteen-year-old neighbor of the deceased, testified that she saw the defendant strike Matthew Holder about a month before the incident in question. According to her testimony, the defendant picked Matthew up by one arm and swatted him with a fly swatter. She remembered that the defendant hit the boy until the fly swatter broke.

Larry Cooley testified that he had known the defendant quite a few years. He stated that they met again while in jail together in August 1973. The witness reported a conversation in jail with the defendant that occurred two or three days after the defendant had been incarcerated. The defendant had told him that he had picked up the deceased by the head and spanked him because the child was having trouble with potty training. On cross-examination, Cooley conceded that he could not recall the defendant's exact words and that his testimony might not be entirely accurate.

Finally, the State called Cathy Goins, the eleven-year-old sister of Gayla and neighbor of the deceased. She testified that she saw the defendant pick up the deceased and whip him with a fly swatter for "about five minutes." She recalled that the defendant stopped hitting the boy only when the fly swatter broke and flew "over the car and about three feet." On August 23, 1973, she remembered seeing the defendant let Matthew into the house and later heard a "little cry," which she recognized as Matthew's. She later saw a shadow of an adult go by Matthew's bedroom window and then heard a big thump and a scream from Matthew. She described the defendant as red and sweating when he came out of the house when the ambulance arrived. She said he looked like he was mad.

The defendant contends that he was not proven guilty beyond a reasonable doubt of the offense of involuntary manslaughter.

Ill.Rev.Stat. 1973, ch. 38, sec. 9-3(a) defines involuntary manslaughter as follows:

"A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly."

This definition has three essential elements: 1) an act or acts which cause death; 2) the act or acts are likely to cause death or great bodily harm; 3) the act was performed recklessly by the accused.

The defendant admitted performing the act that resulted in his stepson's death, and we believe that this act was likely to cause great bodily harm under the circumstances. The deceased was only two-and-one-half-years-old. He was seated on the toilet in a precarious position. His legs were entangled in his pants. The defendant had to hold the child to prevent him from falling off or into the toilet. The tub was only two feet away. The defendant swatted the deceased on the rear, the only portion of his body that supported him. We are of the opinion that from the foregoing circumstances the trial court could reasonably conclude not only that the defendant's act caused the child to fall or be propelled against the bathtub with such a force that the boy sustained a fatal head injury but also that the blow administered by the defendant's hand was within the category of acts likely to cause great bodily harm under the circumstances.

The third element of the offense of involuntary manslaughter is that the act be performed recklessly. Recklessness is defined as follows:

"A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Ill.Rev.Stat. 1973, ch. 38, sec. 4-6.

The defendant was aware of the unstable position of the deceased. The accused had himself placed the boy on the stool. The defendant was also aware that the tub was only two feet away. He knew that the boy's legs were constrained by his pants. He even had to hold the child on the stool to keep him from falling off the toilet. Despite his awareness of the precarious position in which he himself had placed the child, the defendant swatted the boy on the only portion of his frame that supported him. The blow propelled or caused the deceased to hit his head against the bathtub with a force sufficient to cause the fatal

subdural hemotoma. We find that the circumstances of the instant case remove the swatting from the realm of common discipline. A substantial and unjustifiable risk of harm to the deceased accompanied the swat administered by the defendant's hand. Accordingly, we conclude that the trial court did not err in finding that the evidence, although in part circumstantial, established the defendant's guilt of the offense of involuntary manslaughter beyond a reasonable doubt.

The defendant also contends that the trial court erred in admitting evidence from which it could be inferred that the defendant had abused the deceased child.

Prior abusive treatment of a deceased, which is consistent with the victim's injuries, is relevant to the manner in which the deceased is killed. (People v. Holland, 11 Ill.App.3d 591, 297 N.E.2d 310.) The deceased's babysitter testified that she observed, on the day before the child's death, a bruise on the left side of his face which she characterized as a hand print. The babysitter also testified that she had observed marks on the dead boy's neck, back, and body and belt marks on his back and rump on other occasions during and after April 1973. She had never seen any marks prior to April 1973. The deceased's father similarly observed marks on his son during and after March 1973, but never saw any before March 3, 1973, the date of the defendant's marriage to the deceased's mother. The foregoing evidence, in our opinion, was, when coupled with other evidence, of probative value to show a sufficient connection between the marks observed and defendant. In view of the testimony of the two neighbor girls who actually saw the defendant administer punishment to the deceased, which was apparently excessive under the circumstances, and in light of common experience, we have determined that it was more probable than not that a connection existed between the marks seen on the deceased boy's body by two persons on several occasions and the defendant. Consequently, we find that the above evidence was admissible to show a continued course of conduct that is consistent with the deceased's injuries and relevant to the manner in which he was killed.

The defendant next argues that the court erred in allowing the

doctor who examined the child when he was brought to the hospital to testify that in his opinion "there might be child abuse."

The doctor based his opinion on the nature of the injury, the circumstances of the child's admission to the hospital, and accounts of the injuries given to him by the child's mother and step-grandmother. The doctor observed that the child had suffered a serious head injury which had resulted in partial paralysis and unconsciousness. He also observed blood in the child's mouth and marks on his neck. The child's mother told the doctor that her son had fallen in the bathtub. The doctor had the defendant's mother call her son. The defendant refused to talk with the doctor about the incident. He subsequently learned from the defendant's mother that the defendant had struck the child from behind while he was on the toilet, causing the boy to fall and hit his head on the bathtub. Given these facts, we believe that the doctor properly opined that child abuse might have occurred in the instant case. His opinion regarding the possibility of child abuse did not go to an ultimate question of fact. Thus, we conclude that the court did not err in admitting the doctor's opinion that there might have been child abuse in the present case.

Finally, the defendant assigns error to the admission of the testimony of the deceased child's grandmother that the boy once became upset at the sight of the defendant in a restaurant. In particular, the defendant urges that the grandmother's testimony was irrelevant. We agree, but find this error harmless under the circumstances. The dead boy's fear, whatever its cause, was not probative of whether or not the defendant was criminally responsible for the boy's death. In light of the other proper evidence of the defendant's abusive conduct towards the deceased, however, it is our opinion that the defendant was not unfairly prejudiced by the admission of the grandmother's testimony. Although the defendant did not receive a perfect trial, he was afforded his constitutional right to a fair trial.

For all of the above reasons, we affirm the judgment of the circuit court of Union County.

Affirmed.

CONCUR:

KARNS, J. and CARTER, J.

STATE OF ILLINOIS



74-192

Blaser's Auto Sales, Inc.

vs.
American Motors Sales Corp.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present—

HON. Leland Simkins, Presiding Justice

HON. Harold F. Trapp, Justice

HON. James C. Cravens, Justice

JOHN E. HALL, Clerk

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

_____ August 28, 1975 _____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:



STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

ASER'S AUTO SALES, INC.,)	
Illinois Corporation,)	
)	
Plaintiff-Appellant,)	
)	
v.	)	Appeal from
	)	Circuit Court
ERICAN MOTORS SALES CORPORATION,	)	Rock Island County
Delaware Corporation, and)	
ERICAN MOTORS CORPORATION, a	)	Honorable Richard Stengel
poration,	)	Presiding Justice
)	
Defendants-Appellees.)	

Abstract

JUSTICE CRAVEN delivered the opinion of the court:

Plaintiff was a franchise automobile dealer for the defendant American Motors Sales Corporation. The written franchise between the parties expired by its own terms in January 1973. Thereafter, however, the parties continued to undertake certain transactions and deal in the same manner, much the same as their dealings prior to the written expiration date. On July 17, 1973, the defendant notified plaintiff of the termination of the franchise agreement with an effective date of October 19, 1973.

On November 16, 1973, plaintiff commenced this action for injunctive relief and for money damages. After a hearing, the circuit court denied plaintiff's request for a preliminary injunction; or more accurately, for a mandatory injunction requiring

the defendant to continue to operate under the franchise agreement. This interlocutory appeal is from that denial. We affirm the action of the trial court.

The parties are essentially in agreement that the sole issue before this court upon appeal is whether the trial court abused discretion in denying the injunctive relief. The issuance of an injunction is not a matter of right and the issuance of a mandatory injunction that would not preserve, but would, in fact, change the status quo is clearly not a matter of right. (Ambassador Foods Corp. v. Montgomery Ward & Co., 43 Ill.App.2d 100, 192 N.E.2d 572.)

In this case, the status quo as of the date of the filing of the complaint was one wherein the franchise agreement had been terminated by the defendant's notice under date of July 17, 1973. Although there is some controversy in the testimony as to whether the dealings between the parties subsequent to the effective date of termination were merely cleaning up loose ends of the terminated agreement, or transactions between the parties under the same terms and conditions as the prior agreement, we certainly cannot say from a review of the record that the trial court's conclusion that the agreement had been terminated and that the status quo was one of termination was contrary to the manifest weight of the evidence. Inasmuch as the testimony at the hearing is susceptible to such a conclusion, that the complaint seeking the injunctive relief is not verified, there was no abuse of discretion in the denial of the injunctive

In Ambassador, the court noted:

"There is a sound judicial skepticism concerning the need of a mandatory injunction even when its issuance is sought after a full hearing of the case. So much more so is this true when the court is asked to make such drastic use of its powers preliminarily. We are dealing here with 'an extraordinary remedial process which is not a matter of right, but may be granted only upon the exercise of sound judicial discretion in cases of great necessity.' (Citations.)

"For a court to find that there exists the extreme urgency or 'great necessity' justifying a mandatory injunction, the need for such relief must, indeed, be clearly established and free from doubt. (Citations.)" 43 Ill.App.2d 100, 104;107, 192 N.E.2d 572,575.

From this record we do not find that the plaintiff has established that without the injunction it will sustain actual and substantial injury, that the injury is irreparable, nor is it shown that there is probability of ultimate success upon the merits. (See I.L.P. Injunctions §§ 12-20; John Deere Co. v. Hinrichs, 36 Ill.App.2d 255, 183 N.E.2d 309.) The judgment of the circuit court of Rock Island county is affirmed.

JUDGMENT AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.



60079

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
MARVIN TAYLOR,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE SIMON delivered the opinion of the court:

Marvin Taylor was indicted for rape, robbery and aggravated battery. (Ill. Rev. Stat. 1969, ch.38, §11-1, §12-1, §18-1.) A jury found him guilty of aggravated battery, but not guilty of the other offenses. He received a sentence of not less than 2 nor more than 8 years in the Illinois State Penitentiary. On appeal defendant argues that his conviction must be reversed because the jury was not instructed that it could find him guilty of battery, a lesser included offense of aggravated battery. Because this court holds that the defendant waived his right to have the jury so instructed, it is not necessary to recite the facts of the crime.

Before an instruction will be given to the jury, the party desiring the instruction must tender it to the court. (Ill. Rev. Stat. 1973, ch.110A, §451(c); Ill. Rev. Stat. 1973, ch.110, §67(1).) Failure to tender an instruction waives the right to have it given. (People v. Fairchild (1975), 28 Ill.App.3d 427, 328 N.E.2d 361; People v. Holt (1972), 7 Ill.App.3d 646, 288 N.E.2d 245; People v. Lenker (1972), 6 Ill.App.3d 335, 285 N.E.2d 870; People v. Conway (1971), 3 Ill.App.3d 69, 278 N.E.2d 852.) The record discloses that defendant tendered six instructions, none of which pertained to battery. Only one of these, a self-defense instruction, was not given, and defendant does not argue error in that regard.

Defendant did not tender I.P.I. - Criminal No. 11.06 "Issues in Battery" which instructs the jury what propositions the State must prove in order to find an accused guilty of battery. At the instruction conference, the State offered I.P.I. - Criminal No. 11.05 "Battery," which defines battery, and defense

counsel objected to a battery instruction because there was "[no] law controlling as to that instruction * * * ." The trial judge indicated that 11.05 would be given over the objection, and defendant "suggest[ed]" that in that case the jury be given a verdict form for battery. The court then explained that 11.05 was being given because to properly instruct the jury regarding aggravated battery it is necessary to first define battery, and that this procedure was called for in the Committee Note on the aggravated battery instruction. Upon receiving these explanations, defense counsel responded, "Oh, yes. * * * I see. Yes, Okay." The court correctly explained why 11.05 was being given, defense counsel understood the explanation and withdrew his objection. He did not offer verdict forms for battery, and the conference continued with consideration of the instructions tendered by defendant.

Defendant offered an instruction based on I.P.I. - Criminal No. 2.01 "The Charge Against the Defendant," which read, "The defendant is charged with the crime of rape, which includes the crimes of aggravated battery, battery and robbery. The defendant has pleaded not guilty." The State's Attorney objected on the ground that the instruction as worded made no sense, was confusing and mistated the law. Defense counsel responded, "The inclusive crime that I had in mind there, Judge, was the battery. Maybe I can reword it." The trial court then ruled that because the defendant was not charged with battery, the jury would not be given a verdict form for battery, and that defendant's instruction required correction. Defense counsel responded, "All right." As modified by defense counsel, the instruction given to the jury read, "The defendant is charged with the crime of Rape, Aggravated Battery and Robbery. The defendant has pleaded not guilty."

Defendant never tendered any instructions or verdict forms on battery, and in fact objected to the battery instruction offered by the State. Defendant was given the opportunity to amend his instruction relating to the charges against him, and did so, but the instruction, neither as originally offered nor

as amended, included the issue charge of battery. Under these circumstances the defendant has failed to preserve and has waived error, if any, in the failure to instruct the jury on battery.

JUDGMENT AFFIRMED.

BURKE, P.J., and GOLDBERG, J., concur.

3D
31 T.A. 850



61320

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
POSIE JONES,	)	HONORABLE
	)	ARTHUR V. ZELEZINSKI,
	)	PRESIDING.
Petitioner-Appellant.)	

PER CURIAM (First District, First Division).

Before BURKE, P.J., GOLDBERG, J. and EGAN, J.

This is an appeal by the petitioner, Posie Jones, from the dismissal of his post-conviction petition without an evidentiary hearing. (Ill.Rev.Stat. 1971, ch. 38, par. 122-1 et seq.) The only issue is whether counsel appointed to represent petitioner in the post-conviction proceedings failed adequately to represent him because he did not amend petitioner's pro se petition. Ill. Rev.Stat. 1973, ch. 110A, par. 651(c).

The petitioner's handwritten post-conviction petition, filed April 14, 1971, alleged that on August 14, 1969, Judge Zelezinski had imposed varying terms of imprisonment upon him following a plea of guilty to six charges, the sentences to run concurrently with a 15 to 30 year sentence imposed by Judge Ryan on April 1, 1969, following petitioner's plea to armed robbery indictment 68-3392. The pro se petition sets forth 30 paragraphs of alleged deprivations of constitutional right most of which are not directly related to the plea of guilty such as arrest without a warrant, an illegal line-up and various specifications of police misconduct. Relevant to the plea of guilty, the petition alleged his mother had hired an attorney who failed to prepare a defense and let the State force him to trial, that he was afraid to fire this attorney because his mother would lose the money she had paid, that he was not afforded the right to call witnesses because the State rushed him to trial without allowing him time to notify witnesses, that he was coerced into pleading guilty because the State's Attorney

told his family and him he would receive 30 to 60 years on each charge if he did not. The State moved to dismiss on the grounds that the allegations failed to raise any constitutional question and were bare allegations not sufficient to require a hearing.

At the hearing on February 29, 1972, the Assistant Public Defender referred to a certificate of compliance with Supreme Court Rule 651(c) filed earlier (on January 13, 1972), and reiterated that he had examined the records of the proceedings at trial, thoroughly studied the petition, consulted with the petitioner by mail and personally on December 10, 1971, and on January 13, 1972, and concluded that based on his study of the petition it "manifested all possible claims subject to review" under the Act. The Assistant Public Defender presented the substance of the petition to the court orally and explained that no affidavit in support of the petition had been filed because the petitioner supplied him "with no names of people who might be called as affiants in his behalf."

Petitioner's contention that he received inadequate representation in the post-conviction proceedings is governed by the rule announced in People v. Slaughter, 39 Ill.2d 278, 285, 235 N.E.2d 566, now set forth in Supreme Court Rule 651(c) (Ill.Rev.Stat..1971, ch. 110A, par. 651(c)). However, when counsel complies with the requirements of Slaughter and Rule 651(c) and decides to stand on the pro se petition without amendment, counsel will not be charged with incompetence unless reason exists to believe the petition could have been successfully amended. People v. Smith, 40 Ill.2d 562, 241 N.E.2d 413; People v. Stovall, 47 Ill.2d 42, 46, 264 N.E. 2d 174.

Petitioner first claims the petition should have been amended to "put forward" as "facts"; that despite eight continuances on motion by defendant, defense counsel who stated he had been in the case from the beginning, requested a continuance, and when this request was denied, defense counsel asked for a conference and after

this conference petitioner pleaded guilty. These facts, however, do appear of record from the report of proceedings of the guilty plea which had been attached to the State's motion to dismiss. Therefore, amendment of the petition to present these factual points was unnecessary.

Next, petitioner claims that post-conviction counsel "failed to raise any issue" concerning the denial of the motion for a continuance. Since the facts concerning the continuance are also of record, no amendment for this purpose was necessary. The legal sufficiency of this point is governed by the settled principle that a denial or grant of a continuance is a matter within the sound discretion of the court and there is no indication that the court abused its discretion in this case, or that the defendant was prejudiced. Since a plea of guilty waives all non-jurisdictional errors (People v. Mendoza, 48 Ill.2d 371, 374, 270 N.E.2d 30), petitioner has not demonstrated that the petition could have been successfully amended in this regard. See People v. Barkan, Appellate Court, No. 59991, June 24, 1975, slip opinion at 5-6.

Petitioner also claims the petition should have been amended to show the plea of guilty "resulted from coercion." Petitioner, himself, stated in the pro se petition, that he was forced to plead guilty by statements made by the Assistant State's Attorney to him and his family that he would otherwise receive 30 to 60 years on each charge. There is no basis in this record to believe any other further factual basis for the claim of "coercion" existed which appointed counsel might have supplied through an amendment of the pro se petition or that the petition could have been redrawn to present petitioner's claims any more effectively. Appointed counsel in fact stated petitioner had not supplied any other information.

A related point is the claim now put forth that the petition could have been amended to present the issue of the petitioner's "physical illness" to the court. This is based on the following



comment made by petitioner's mother early in the proceedings of August 14, 1969, when the defendant was seeking a continuance:

"He should see a doctor. I called him.
He has been sick. He say wait until he
come back, and he will be back Monday."

So far as the record reveals, this is the only factual basis for this claim. Petitioner did not say he was sick or that his alleged illness caused him to plead guilty, and there is no reason to think it did, based on this record. (Compare People v. Barkan, Appellate Court, No. 59991, June 24, 1975, slip opinion at 5.) There was, therefore, nothing of substance to present to the court.

Finally, petitioner contends the trial judge's admonition that petitioner could be sent to the penitentiary "for a minimum of four years to an indeterminate number of years" did not adequately apprise the defendant of the maximum term of imprisonment, as required by Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402). However, Rule 401(b), in effect at the time of this plea of guilty, did not require that the court specifically admonish the defendant concerning the possible maximum sentence. (Ill.Rev. Stat. 1969, ch. 110A, par. 401(b).) However, even a violation of Supreme Court Rule 402 does not raise a substantial constitutional question under the Illinois Post-Conviction Hearing Act, since failure to fully comply with Supreme Court Rule 402 does not, of itself, present an issue of constitutional magnitude, cognizable in a post-conviction petition. (People v. Covington, 45 Ill.2d 105, 257 N.E.2d 106; People v. Barr, 14 Ill.App.3d 742, 303 N.E. 2d 202, affirmed People v. Krantz, 58 Ill.2d 187, 317 N.E.2d 559.) It is evident, therefore, that any attempt to amend the pro se petition along these lines would have been unsuccessful.

In the case at bar, counsel filed a certificate pursuant to Supreme Court Rule 651(c) and represented orally to the court that he had twice spoken to the petitioner personally and reviewed the transcript and that there was no basis upon which the petition

could have been successfully amended. Counsel stated specifically that no affidavits were provided because the petitioner did not furnish the names of any witnesses. In addition, there was a hearing before Chief Criminal Court Judge Joseph A. Power on January 13, 1972, the specific purpose of which was to inquire whether petitioner was possessed of any evidence, other than that stated in the pro se petition, itself, which would require petitioner's presence and testimony at a hearing on the post-conviction petition. The court concluded there was not. Nothing in this record indicates that the pro se petition could have been successfully amended or that counsel was in any way derelict in carrying out the professional responsibility required by Supreme Court Rule 651(c). Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

37
311.A. 862



No. 69735

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)
) COURT OF COOK COUNTY.
v.)
) HONORABLE
EDWARD SMITH,) JACK ARNOLD WELFELD,
) PRESIDING.
Defendant-Appellant.)

Before DEMPSEY, McNAMARA and MEJDA, JJ.

PER CURIAM:

Edward Smith, defendant, was found guilty after a bench trial of the crime of battery in that he caused bodily harm to Johnnie Davis (Ill.Rev.Stat. 1973, ch.38, par.12-3). He was fined \$10 plus court costs. Defendant appeals arguing (1) that the evidence was insufficient to establish his guilt, (2) that at the time of the incident he was acting in self-defense, and (3) that the trial court erred in denying his post-trial motions.

At trial Johnnie Davis, age 15, testified that on February 25, 1974, he was attending the Doolittle Elementary School where the defendant was his gym teacher. On that date the defendant came into the gym class and told everyone to sit down because they were not going to have a gym class until a missing watch was returned. At that time Davis told the defendant that he was going to go back to his room. The defendant stopped Davis and took him to Mrs. Netherly's office. The defendant told Davis that he was going to stay in the office and Davis said that he was not. At that time defendant told Davis not to get loud. The defendant then began to choke Davis. At that time Davis stood up on a bench and grabbed defendant's hand. The defendant hit Davis in the eye with his fist and Davis fell to the floor. Mrs. Netherly got a napkin and put it on Davis' eye. Approximately 30 minutes later, Davis' mother arrived at the school and took him to the hospital. Photographs of Johnnie Davis were taken at the hospital and were admitted into evidence.

Lottie Drain, the mother of Johnnie Davis, testified that on February 25, 1974, she received a message that her son had been injured in an accident at the Doolittle School. She proceeded

to the school where she found Johnnie Davis seated in a room. At that time Johnnie's eye was swollen closed and blood was running out of his nose. Mrs. Drain testified that she took her son to Michael Reese Hospital where she turned him over to the nurse. She then called the police. Johnnie Davis was treated at the hospital for approximately four hours and then released. For the next six days Johnnie Davis was troubled with blood coming out of his nose and was treated at the hospital on four different occasions.

Edward Smith, defendant, testified that he is a health and physical education instructor employed by the Chicago Board of Education at the Doolittle Elementary School. On February 25, 1974, at approximately noon, he arrived for his physical education class in which Johnnie Davis was a student. At that time he asked his class to be seated. Everyone sat down except Johnnie Davis. Defendant testified that he told Davis that if he did not sit down he would be taken to the office. Davis refused to sit down and the defendant took him to the office. At that time Davis was swearing at the defendant. Present when they arrived at the office were Mrs. Netherly and Dr. Roble. Defendant testified that he was attempting to tell Mrs. Netherly what happened but Davis kept interrupting. Defendant stated that when Davis kept interfering he touched Davis. Davis told the defendant not to put his hand on him and Davis jumped up on a bench and began swinging at the defendant. Defendant stated that he put his arm up to try to block Davis' punches and accidentally hit Davis in the face, knocking him to the floor. Defendant stated that he did not at any time administer any discipline to Davis.

Eloise Jane Netherly testified that she is the school community representative at the Doolittle Elementary School. On February 25, 1974, the defendant brought Johnnie Davis into her office. As defendant was telling her why he was in the office, Davis began to get loud and mean. At that time defendant told

Davis to be quiet. Johnnie Davis then got up on a bench and began swinging both hands at the defendant. Mrs. Netherly testified that the next thing she knew Davis was lying on the floor. She did not know how he got on the floor.

Dr. Fred K. Roble, a dental surgeon employed by the Chicago Board of Health, testified that on February 25, 1974, he was at the Doolittle Elementary School. Dr. Roble testified that when he walked into Mrs. Netherly's office, he observed Johnnie Davis swinging at the defendant. The defendant was trying to protect himself from Davis. Dr. Roble testified that he did not see the defendant strike Davis and he did not see Davis on the floor.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt. The rule is well established that in a bench trial the credibility of witnesses and the weight to be given to their testimony are matters for the trial court to determine. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. (People v. Clark (1972), 52 Ill.2d 374, 288 N.E.2d 363.) The testimony of one witness if positive and credible is sufficient to sustain the conviction even though contradicted by the accused. People v. Griffin (1973), 12 Ill.App.3d 193, 297 N.E.2d 770.

Defendant argues that, as defendant's teacher, he was charged with a special duty to maintain discipline in the school and stood in loco parentis to Davis and that his actions in disciplining Davis were proper since he acted without malice and there was no excessive punishment or permanent injury to Davis. In People v. Ball (1974), 58 Ill.2d 36, 317 N.E.2d 54, the Illinois Supreme Court set forth the standard to be used where a teacher is charged with committing a battery upon one of his students. The court held that a teacher stands in loco parentis to the child and may properly administer reasonable corporal punishment. However, a teacher is subject to the same standard of reasonableness which is applicable to the parents in disciplining their children.

In the case at bar, the testimony of Johnnie Davis established that after an argument with the defendant during class, he was taken to the school office. At that time the defendant told him to be quiet. When Davis did not comply with defendant's order, the defendant began to choke him. Davis tried to stop defendant from choking him and the defendant struck Davis in the eye, knocking him to the floor. Davis' mother testified that when she arrived at the school a short time later Davis' eye was swollen closed and he had blood coming from his nose. She immediately took Davis to the hospital where he remained for several hours. Thereafter, Davis was treated at the hospital on three more occasions. This testimony was positive, credible and sufficient to establish that the force used by the defendant went far beyond the reasonable force allowed under Illinois law. The State's evidence was sufficient to establish defendant's guilt beyond a reasonable doubt. While the defendant and several defense witnesses testified to a contrary version of what had occurred, this did not create a reasonable doubt as to his guilt since a trial judge is not obliged to believe a defendant's testimony and that of his witnesses. People v. Lahori (1973), 13 Ill.App. 3d 572, 300 N.E.2d 761.

Defendant's next contention is that he was acting in self-defense at the time he struck Johnnie Davis. Whether a defendant's actions are justified on the law on self-defense is always a question for the trier of fact. (People v. Kendricks (1972), 4 Ill.App.3d 1029, 283 N.E.2d 273.) Here, the trial judge was presented with two completely contradictory versions of what occurred. It was his function sitting as trier of fact to determine which version was correct. The trial judge in finding defendant guilty expressly stated that he found Johnnie Davis' testimony "wholly believable and wholly credible." After a complete review of the entire record, we cannot say that the trial judge's determination was erroneous.

Defendant's final argument is that the trial court erred in denying his post-trial motion. After trial the defendant presented a motion to vacate or, in the alternative, a motion for a new trial. The principal points relied upon in that motion are the same points which defendant has raised in this appeal. In view of our holding that these points are without merit, we conclude that the trial court properly denied defendant's post-trial motion.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

3D
311.A. 863



No. 60896

CONSOLIDATED PACKAGING CORPORATION,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
ILLINOIS FAIR EMPLOYMENT PRACTICES	)	HONORABLE
COMMISSION, and JAMES STALLWORTH,	)	ARTHUR L. DUNNE,
	)	PRESIDING.
Defendants-Appellees.)	

Mr. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

Plaintiff, Consolidated Packaging Corporation, filed a complaint in the circuit court of Cook County under the Administrative Review Act against defendants, Illinois Fair Employment Practices Commission and James Stallworth, for judicial review of a Commission decision. The court granted defendants' motion to dismiss on the grounds that the court was without jurisdiction because the complaint was not filed in a timely fashion. Plaintiff appeals, raising the sole issue of whether its alleged prior unaccepted proffer of the complaint to the clerk of the circuit court was sufficient to constitute a filing.

We affirm.

The record reveals the following pertinent facts. On November 16, 1973, the Commission mailed a copy of its Order and Decision to plaintiff. Under section 4 of the Administrative Review Act (Ill.Rev.Stat. 1973, ch.110, par. 267) a decision of the Commission is deemed to have been served when properly deposited in the U.S. Mail, and an action for administrative review of such a decision must be filed with the circuit court "within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby." The thirty-fifth day was December 21, 1973, but the complaint was not filed until December 26, five days later.

Defendants moved to dismiss the complaint for lack of subject matter jurisdiction. In response, plaintiff presented the affidavit of an employee of plaintiff's attorney. The employee's affidavit alleged at 3:30 P.M. on the afternoon of December 21, 1973, that he was an experienced filing clerk and that he tendered the complaint and filing fee to the deputy clerk of the circuit court stationed at the appropriate counter in the clerk's office. The employee further alleged that he

"was informed by the filing officer that the documents would not be accepted in that, in Administrative Review cases, the Summons and Complaint had to be mailed by the Clerk's office on the day that the action was filed and because December 21, 1973, was the Friday preceding a four-day Christmas holiday, the two clerks who entered and mailed the documents had left the office early in anticipation of the said extended Christmas holiday ***."

Plaintiff argued he was prevented from filing his complaint on the thirty-fifth day by the refusal of the deputy clerk to accept the complaint for filing. A hearing was held on the motion.

At the hearing, defendants presented the testimony of a chief deputy clerk of the circuit court who was the supervisor responsible for the deputy clerks in the room where the complaint was allegedly tendered on December 21. The supervisor, Mr. Marzano, testified that at 3:30 on the afternoon in question there were clerks on duty who had the authority to receive plaintiff's complaint for filing. He could have accepted the document himself because he had the authority to do so and was on duty at that time. Upon questioning by the court, the witness further testified that the customary procedure in such cases is to stamp the document as having been filed at that time so as to protect the statute of limitations.

In view of Marzano's uncontradicted testimony, the trial court properly dismissed the complaint on the grounds that it was not filed in a timely fashion. Marzano and other clerks were on duty at 3:30 on the afternoon of December 21,

1973, and could have received plaintiff's complaint for filing. The complaint could have been time-stamped at that time so as to have established the filing of the complaint on the thirty-fifth day. The most that can be said about the affidavit of plaintiff's attorney's employee, if believed, is that it portrays the employee as being misinformed, but not prevented from filing the complaint on December 21.

The order of the circuit court of Cook County dismissing the complaint is affirmed.

Order affirmed.

McNamara and Mejda, JJ., concur.



61179

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 DONNA HUTCHISON,)
)
 Defendant-Appellant.)

APPEAL FROM
 CIRCUIT COURT
 COOK COUNTY

HONORABLE
 JOHN M. BREEN, JR.,
 Presiding.

PER CURIAM.

Before McGLOON, P.J., DEMPSEY and MEJDA, JJ.

Donna Hutchison, defendant, appeals from an order of the circuit court of Cook County revoking her probation.

Defendant was originally charged by complaint with conspiracy to commit armed robbery. On July 30, 1973, the charge was reduced to conspiracy to commit theft and defendant entered a negotiated plea of guilty. She was sentenced to two years' probation.

On July 26, 1974, a hearing was held on a rule to show cause why defendant's probation should not be terminated. The basis for the rule was that subsequent to being placed on probation she had committed the offense of possession of firearms ammunition without an Illinois State Firearms Owner's Identification Card. At the conclusion of the hearing defendant's probation was revoked and she was sentenced to a term of one year in the Cook County Department of Corrections.

While defendant raises several issues on appeal, it is necessary to consider only her argument that the complaint which purported to charge her with conspiracy to commit theft and to which she entered a plea of guilty did not state an offense and



is void. The question of whether a complaint is void presents a jurisdictional issue which is not waived by a plea of guilty and may be raised at any time, including an appeal from a subsequent revocation of probation. People v. Gregory (1974), 59 Ill. 2d 111, 319 N.E. 2d 483.

Defendant was originally charged by complaint with conspiracy to commit armed robbery. The complaint alleged that defendant

"committed the offense of conspiracy to commit armed robbery in that he knowingly conspired with John Valerie, Derick Porter, and Mary Thompson to commit therein the crime of armed robbery, in that an agreement was made between them to hold up the establishment known as Colonel Sanders Kentucky Fried Chicken Store, 1222 Chicago Avenue, Evanston, Ill. In furtherance of that agreement John Valerie and Derick Porter were apprehended in the rear of that establishment while armed with a 32 cal. automatic (Astra Constable 32 cal. automatic."

Pursuant to plea negotiations, the charge was reduced to conspiracy to commit theft, and defendant entered a plea of guilty. In reducing the charge the prosecutor struck the words "armed robbery" and inserted the word "theft," and struck the words "hold up the establishment known as" and inserted the words "obtain or unauthorized control of property of." The record demonstrates that the prosecutor also struck the last sentence which alleged the overt act by putting three slanted parallel lines through the sentence. The complaint then alleged that defendant

"committed the offense of conspiracy to commit theft in that he knowingly conspired with John Valerie, Derick Porter, and Mary Thompson to commit therein the crime of theft, in that an agreement was made between them to obtain or unauthorized control of property of Colonel Sanders Kentucky Fried Chicken Store, 1222 Chicago Ave., Evanston, Ill."

Defendant argues that the amended complaint does not state an offense since no overt act in furtherance of the conspiracy is alleged. The law is clear that in order to sustain the charge of

conspiracy an act in furtherance of the illicit agreement must be alleged and proved to have been committed by the defendant or a co-conspirator. (Ill. Rev. Stat. 1973, ch. 38, par. 8-2(a)). In the instant case, the original complaint charging defendant with conspiracy to commit armed robbery did state an overt act done in furtherance of the conspiracy. However, in amending the complaint to charge conspiracy to commit theft, that sentence was stricken by the State. There is no other allegation in the amended complaint which would in any way allege an overt act on the part of defendant or a co-conspirator. The amended complaint failed to state an offense.

The State argues that since the felony complaint which originally charged defendant with conspiracy to commit armed robbery was valid, the court had jurisdiction to accept a negotiated plea of guilty to a reduced charge. We agree that the original complaint charging defendant with conspiracy to commit armed robbery was valid; however, this does not add validity to an otherwise invalid amended complaint. The amended complaint failed to allege an overt act in furtherance of the conspiracy and was therefore void.

The judgment of the circuit court of Cook County is reversed.

Reversed.

3D
311A. 881



No. 59835

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
CALVIN FLEMMINGS,	)	HONORABLE
	)	IRWIN COHEN,
Defendant-Appellant.	)	PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

Calvin Flemmings, defendant, was found guilty after a bench trial of the crimes of unlawful use of weapons and failure to possess an Illinois State Firearm Owner's Identification Card. (Ill.Rev.Stat. 1973, ch. 38, par. 24-1(a)(10), and 83-2.) He was sentenced to a term of six months in the House of Correction on each charge, the sentences to run concurrently. Defendant appeals, arguing that the trial court erred in denying his motion to suppress and that the evidence was insufficient to establish his guilt beyond a reasonable doubt on the charge of failure to possess an Illinois State Firearm Owner's Identification Card.

On the motion to suppress and at trial the following evidence was adduced. Michael Dimitro, a Chicago police officer, testified that on May 8, 1975, at approximately 6:25 P.M., he observed a vehicle containing two men, one of whom was the defendant, commit a traffic violation. The defendant was seated on the passenger side of the vehicle. Officer Dimitro testified that he was about to stop the car when the car stopped and the defendant jumped out and ran into the hallway of the building at 204 East 42nd Street, Chicago, Illinois. Officer Dimitro testified that this was a high crime area and he thought defendant's action unusual. Officer Dimitro followed the

defendant up the stairs of the building and observed him place an object on the second floor between the door and the gate. Defendant then proceeded up to the third floor where he knocked on a door. Officer Dimitro proceeded up to the third floor. When no one answered the door Officer Dimitro asked the defendant what he was doing there. Defendant stated that he was going to see a friend. Officer Dimitro asked defendant his friend's name and defendant admitted that he was not there to see a friend. Officer Dimitro and the defendant proceeded to the second floor landing where Officer Dimitro observed the object defendant had placed on the floor. Officer Dimitro asked defendant what the package contained and defendant replied that it was a gun. At that time Officer Dimitro recovered the package which contained a .22 caliber revolver containing seven rounds of live ammunition. Defendant was then placed under arrest.

Defendant's first contention is that the trial court erred in denying his motion to suppress the revolver since it was discovered as a result of his illegal arrest. In Terry v. Ohio, 392 U.S. 1, the United States Supreme Court upheld the temporary questioning of a citizen, often called a stop, under appropriate circumstances to facilitate the investigation of possible criminal behavior. This rule has been codified in section 107-14 of the Code of Criminal Procedure. (Ill.Rev.Stat. 1973, ch. 38, par. 107-14.) Under the terms of the statute a police officer may question a suspect in a public place for a brief period of time when he "reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense. . ."

In the case at bar, Officer Dimitro testified that as he was about to stop a car for a traffic violation in a high crime

area, the car stopped and the defendant jumped out of the car and ran into the hallway of a building. Officer Dimitro followed the defendant who fled to the second floor of the building. At that time the officer saw defendant place a package on the floor. Defendant then proceeded to the third floor of the building. Officer Dimitro went up to the third floor where he observed defendant knocking on the door. No one responded to the knock and Officer Dimitro asked defendant what he was doing. Defendant first stated that he was going to visit a friend. However, when Officer Dimitro asked the friend's name, he admitted that he was not there to see a friend. The officer, together with the defendant, proceeded down to the second floor where he observed the package lying on the floor. The officer asked the defendant what the package contained and he replied that it contained a gun. The officer recovered the package and found it to contain a .22 caliber revolver with seven live rounds of ammunition. At that time defendant was placed under arrest.

Officer Dimitro's testimony revealed that he was faced with the appropriate circumstances under which he could reasonably detain the defendant until the matter could be more fully investigated. Defendant's actions in running from the car into a building in a high crime area and placing a package on the second floor were certainly suspicious and sufficient to justify further inquiry. Contrary to defendant's contention, he was not placed under arrest at the time he ran up the stairway, but was only detained for questioning. Officer Dimitro's questioning of the defendant was proper and his subsequent discovery of the weapon provided probable cause for defendant's arrest. The actions of the officer under these circumstances were reasonable and within the scope of the statute. (People v.



Thomas, 9 Ill.App.3d 1080, 293 N.E.2d 698; People v. Cribbs, 8 Ill.App.3d 750, 291 N.E.2d 326; People v. Clay, 133 Ill. App.2d 344, 273 N.E.2d 254.) The motion to suppress was properly denied.

Defendant's second contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt on the charge of failure to possess an Illinois State Firearm Owner's Identification Card. To sustain a conviction on this charge it is necessary to establish that the defendant possessed a weapon and did not possess an Illinois State Firearm Owner's Identification Card. (People v. Whitfield, 26 Ill.App.3d 510, 325 N.E.2d 326.) The only evidence adduced at trial regarding defendant's failure to possess an Illinois State Firearm Owner's Identification Card was when Officer Dimitro was asked the following question:

"Officer, at the time you arrested the defendant, did you have occasion to ask him for a State and City Firearm Owner's Identification and was he able to produce these?"

He replied "No". Defendant now argues that the question asked of Officer Dimitro was ambiguous in that it contained two questions and it is uncertain which question Officer Dimitro was answering. After a reading of this question in context we conclude that Officer Dimitro was answering the part of the question that the defendant was not able to produce an Illinois State Firearm Owner's Identification Card. If defense counsel was uncertain as to the officer's answer, he had a sufficient opportunity during cross-examination to explore the issue but did not do so. Officer Dimitro's testimony was sufficient to establish that defendant did possess the weapon in question and that he did not produce an Illinois State Firearm Owner's Identification Card.

59835

Accordingly, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.

60604

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
OLIVER MORGAN (Impleaded),)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
EARL E. STRAYHORN,
PRESIDING.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Following a bench trial, defendant was convicted of aggravated battery in violation of section 12-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 12-4.) and was sentenced to a term of three to nine years. One co-defendant was also convicted, but another was acquitted. On appeal, defendant contends that the trial court erred: (1) in making inconsistent findings, and (2) in failing to order, after trial of the case, a hearing regarding defendant's fitness to stand trial.

The following pertinent evidence was adduced at trial.

For the State:

Willie Grant

He was a Checker cab driver. In the early morning hours of September 17, 1972, he was proceeding north on Paulina after dropping a customer off on 65th Street. At 63rd Street, Gerald Smith stopped him by standing in front of his cab. Smith, Troy Dunlap, and Edward Dunlap (who was sick) and the defendant entered the cab. When they asked him to help them take their sick friend home, he refused. However, when they refused to leave, he closed his protective shield and drove them to 6317 Wolcott where they all exited the cab. They laid Edward on the sidewalk and said he had taken L.S.D. He asked them for his fare of \$1.20. After searching Edward they said they had no funds and Troy then went inside a building to get some money. When he returned, he had a knife. Pointing the knife at Grant, Troy asked him if he still wanted his money. Grant ran from the scene with all four chasing

him. As he ran down an alley a few yards away, he tripped and all four began beating him. At first he was able to take the knife away from Troy and stab the defendant, but Smith wrestled the knife away from him and he subsequently received several severe knife wounds. The assailants ripped the pockets of his trousers and took about \$41.00.

Frank Cavanaugh

He is a Chicago police officer. In the early morning hours of September 17, 1972, he responded to a radio call regarding a robbery in progress. He proceeded to an alley on South Wolcott where he observed Edward Dunlap, who appeared to be drunk, and Smith both standing over Grant who was bleeding profusely. Grant told him that Edward, Smith and two others had robbed him. He found defendant, who was injured, standing further up the alley. Defendant told him that while he was with his wife, he was assaulted. Both Grant and defendant were taken to the hospital. Defendant's wife was there, but had no knowledge of defendant being assaulted. He then arrested defendant and Troy Dunlap. Troy's hand had been cut. He searched the suspects, but found neither money nor weapons in their possession and no weapons were found at the scene.

Gerald Smith on his own behalf

After leaving a party at about 1:00 a.m. on the night of the occurrence, he stopped by a tavern at 63rd and Hermitage. When he saw that none of his friends were there, he walked toward a friend's house near 63rd and Wolcott. As he approached the alley where the incident occurred, he saw defendant stagger out of the alley holding his hands on his stomach. Defendant said nothing when Smith asked him if he was all right. He then heard a noise in the alley. At first he saw Grant on top of Edward Dunlap; but Edward, who was drunk, was able to reverse the position. As he approached the two, a police car pulled into the alley. He denied touching or robbing Grant and testified that he did not ride in a cab that night.

James Thompson on behalf of Smith

He saw Smith at a party. However, at first he gave an address for the party different from the address Smith had given.

Edward Dunlap, Jr. on his own behalf

At about 2:00 p.m. on September 16, 1972, after spending some time with his fiancée, he started drinking and continued at a tavern on 63rd and Honore until about midnight. He does not recall anything that happened after midnight but was able to state that Grant had a knife. Moreover, during his preliminary hearing he was able to recall riding in a cab with three others.

Defendant Oliver Morgan on his own behalf

About 1:30 a.m. on September 17, 1972, he and his wife left a tavern at 62nd and Honore in Chicago where they had been drinking with his brother-in-law, Edward Dunlap, who was drunk. Edward passed out on the street near them. Grant's Yellow cab was across the street and Grant was drinking a can of beer. Defendant and his other brother-in-law, Troy Dunlap, were unable to carry Edward. Smith was not with them. Grant asked them if they needed a cab and helped them put Edward in the cab. Grant was afraid and did not turn on his meter. When they reached Wolcott, Grant first said the fare was \$1.10, but then said it was \$4.00. They took Edward out of the cab and Troy went into the house at 6315 Wolcott to get some money. Defendant and Grant were arguing about the fare. When Troy returned, he did not have a knife, but Grant pulled a knife while they were arguing beside the cab. They started struggling and ended up in the alley. During the struggle defendant was badly cut. He was confused when he told the police that he had been injured in an unrelated assault. He denied taking any money from Grant.

Barbara Wallace

She is Edward Dunlap's fiancée. She saw him on the morning of September 16, 1972. At about 9:00 p.m., while she was with Shirley Morgan, she again saw Edward. He and defendant were drinking at a tavern at 63rd and Hermitage. Edward was drunk.

Shirley Morgan

She is defendant's wife. She was with Barbara Wallace during part of the evening of September 16, 1972. They met defendant and Edward

Dunlap at a tavern on 63rd and Hermitage. She corroborated defendant's story about seeing Grant across from the tavern with a can of beer in his hand. She admitted that she was not with her husband when he was assaulted.

Following this evidence the court found Edward Dunlap not guilty and defendant and Gerald Smith guilty of aggravated battery, but not guilty of armed robbery.

Following these findings, a pre-sentencing report was ordered. Later the court held a hearing in aggravation and mitigation. The pre-sentencing report indicated that defendant used drugs; had suffered a head injury as a child; and had a prior criminal record, including a matter relating to stabbing a schoolmate. Accompanying the pre-sentence report was a psychiatrist's report. After summarizing defendant's background the report stated:

"Mental examination reveals [defendant] in fair contact with reality and oriented in all spheres. He is suspicious and hostile and verbalizes grandiose, autistic, paranoid ideation. He claims he can foretell the future; all prisoners will rise up and subdue the officials. He is destined to do what he must do, thus explaining his behavior.

"Diagnosis:

Schizophrenic Reaction, Paranoid Type

"Summary:

This young man is psychotic and possibly mentally deficient. Because of his distorted thinking he undoubtedly will get into trouble again. He has resigned himself to a life of crime. The prognosis is extremely poor."

Defendant did not request a fitness hearing and the trial court sentenced him to a term of three to nine years. Smith was sentenced to probation.

OPINION

Defendant contends that the trial court erred in making inconsistent findings. His claim is based upon two factors: (1) the trial court's failure to convict anyone of armed robbery; and (2) the trial court's acquittal of Edward Dunlap. Defendant relies primarily upon People v. Ethridge, 131 Ill. App. 2d 351, 268 N.E.2d 260. In

Ethridge the evidence against defendant and his co-defendant was identical except that the evidence against the co-defendant was stronger. However, the trial court acquitted the co-defendant. The reviewing court determined that since the trial court disbelieved the testimony of the State's witnesses regarding the co-defendant, it must also have disbelieved those same witnesses regarding defendant. The court therefore reversed defendant's conviction.

In the instant case, we find no inconsistency in the trial court's findings. Although Grant did testify that \$41.00 was taken from him after his assailants had ripped the pockets of his trousers, Officer Cavanaugh found no money in the suspects' possession immediately after the incident nor did he corroborate Grant's testimony regarding his pockets being ripped. Although defendant admitted riding in Grant's cab and fighting with him, he denied robbing him. In these circumstances, the trial court could properly have determined that the State did not produce the quantum of evidence sufficient to prove defendant guilty of armed robbery beyond a reasonable doubt, especially since the elements of that crime differ from those of aggravated battery.

Similarly, we find no inconsistency in the court's acquittal of Edward Dunlap. While the evidence against Edward Dunlap was substantially the same as the evidence against defendant, it differed in one significant respect. The evidence shows that Dunlap was intoxicated at the time of the incident, and intoxication may negate criminal intent. (Ill. Rev. Stat. 1971, ch. 38, par. 6-3.) On the facts of this case, the trial court could properly have determined that Dunlap did not have sufficient criminal intent because of his intoxication. Dunlap testified that he could not recall anything after midnight on the night of the incident. Not only is this testimony corroborated by his fiancée's testimony, but it is also supported by both Grant and Cavanaugh. In these circumstances, the trial court's findings were not inconsistent.

Defendant next contends that the trial court erred in failing to order, after trial of the case, a hearing regarding defendant's fitness to stand trial. Section 5-2-1(a-c) of the Unified Code of

Corrections (Ill. Rev. Stat. 1973, ch. 38, par. 1005-2-1(a-c).) provides:

- "(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:
 - (1) to understand the nature and purpose of the proceedings against him; or
 - (2) to assist in his defense.
- (b) The question of the defendant's fitness may be raised before trial or during trial. The question of the defendant's fitness to be sentenced may be raised after judgment but before sentence. In either case the question of fitness may be raised by the State, the defendant or the court.
- (c) When a bona fide doubt of the defendant's fitness to stand trial or be sentenced is raised, the court shall order that a determination of that question be made before further proceedings."

Although this section contemplates a determination of fitness to stand trial prior to or during trial, it does not preclude such a determination after trial. In this State, when a bona fide question of defendant's fitness for trial presents itself, a trial court, on its own motion if necessary, must provide for the resolution of that question. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-2-1(c); People v. Plecko, 46 Ill. 2d 301, 263 N.E.2d 66.) The court's failure to resolve such an issue may violate defendant's due process rights. Pate v. Robinson, 383 U.S. 375.

In the instant case, no bona fide doubt regarding defendant's fitness to stand trial was presented. Although there was evidence in the record that defendant had received a head injury as a child and that a psychiatrist was of the opinion that defendant was paranoid, these factors alone do not create a bona fide doubt of defendant's fitness for trial. Defendant testified coherently and rationally at trial. The record contains no indication of inability to understand the nature of the charges or of the proceedings themselves and does not indicate any inability to cooperate with his counsel. Moreover, the psychiatrist's report shows that defendant was "in fair contact with reality and oriented in all spheres." This case is almost identical

to the case of People v. Plecko, 46 Ill. 2d 301, 263 N.E.2d 66, where although two psychiatrists thought defendant was paranoid, they believed he knew the nature of the proceedings and could cooperate with his counsel.

In these circumstances, the trial court's judgment is affirmed.

Affirmed.

DRUCKER and SULLIVAN, JJ., concur.

[PUBLISH ABSTRACT ONLY.]

CHICAGO BAR
OCT 31 1975
ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 LINDA WELLS (Impleaded),)
)
 Defendant-Appellant.)

HONORABLE
JAMES M. BAILEY
PRESIDING

PER CURIAM: (First District, Fifth Division)

The Public Defender of Cook County, appointed as her counsel on this appeal, has filed a motion for leave to withdraw, and the motion is supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396. Therein, counsel states that the sole issue which could be raised in support of the appeal concerns whether defendant was proven guilty of the offense of armed robbery beyond a reasonable doubt. Counsel concludes that such issue is without merit, rendering the appeal frivolous. Copies of the brief and motion were mailed to defendant on May 7, 1975, and on May 16, 1975 she was informed by letter that the court had given her until July 15, 1975 to file any points she desired in support of the appeal. Defendant has not responded.

The deceased, James Denton, owned a small shoeshine shop in Chicago. Otto Wells (no relation to defendant) testified for the State that on the afternoon of February 28, 1971 he, Denton and a third man were drinking liquor inside decedent's shop when defendant and Virginia Jordan (hereafter Jordan) passed by outside. The women were previously unknown to the witness. When Denton beckoned the two women into the shop, the third man left and the

rest of them drank and engaged in conversation for about three hours, including discussions concerning sexual intercourse. About 6 o'clock P.M. Denton set out a cot inside the shop and left the premises with defendant, locking the witness and Jordan inside the shop from the outside. Denton and defendant returned about 20 minutes later, and the witness told Jordan to wait at the shop while he went to get his car, parked nearby, to pick her up. He then went to his home, located nearby, and when he drove back to the shop about 45 minutes later Denton was dead.

Virginia Jordan testified for the State that about 1 o'clock on the day in question she, defendant and several other women were in an apartment where defendant was given a knife by one of the other women. When she and defendant left the apartment, they went to a nearby tavern where they remained for two to three hours. After leaving the tavern, they walked past Denton's shop and he beckoned them inside. She and defendant remained in the shop with Denton and Wells until 6 o'clock P.M., at which time Denton and defendant left, and she and Wells discussed sexual relations. Wells was going to take her to a hotel for that purpose, and since he lived in the neighborhood and did not wish to be seen on the streets with her, he told her to wait at the shop until he returned with his automobile. In the meantime, defendant and Denton returned. While Denton and the two women were in the shop, Denton asked defendant to have sex with him for \$3.00. Defendant refused this offer and then asked the witness if she wanted to rob Denton. Defendant and Denton then struggled and defendant pushed him onto the cot, holding her hand over his mouth while lying on top of him. When defendant asked her to help, the witness attempted to tie his feet with a sheet. A man then appeared at the shop door but left when the witness told him to return later. When she turned around, she saw defendant stabbing Denton with a knife. When she asked why she was stabbing him, defendant replied, "He is better off dead. He can't identify us." Defendant then gave her a wallet, which

she put in her pocket, and then ran out of the shop with defendant behind her. The \$25.00 inside the wallet was later split between them. When she was arrested a few days later, she told the State's Attorney that defendant had stabbed Denton.

Jerry Kearns, the court's pathologist, called by the State, testified that Denton died of three stab wounds, one of which penetrated the heart. The wounds had no jagged edges, and there were no fragments of glass in them.

Police Investigator John Merriwether testified for the State that he had been assigned to investigate the Denton slaying and that he had known defendant since her childhood. She was arrested on March 21, 1971, taken to police headquarters, and there advised of her constitutional rights. She said to the officer, "I did it. I killed him. But you should get Ann Jones too, because she gave me the knife." At the time defendant admitted the killing, she and the witness were alone in the police room, but people were coming in and out.

Anita Dixon, defendant's mother, testified for defendant that she and two other persons were with defendant and Merriwether at the police station and that her daughter did not admit a killing while she was there. She stated that defendant denied the killing when Merriwether asked her the question.

Gloria Richardson testified for the defense that the defendant and Jordan were at her apartment on the morning of the day in question; that they left and when they returned they had blood on their clothing; and that both women went into the washroom to change and wash, at which time the witness heard them arguing.

Defendant testified in her own behalf that she had been convicted of several felonies and had been addicted to heroin in the past. On the day in question she and Jordan sought to purchase heroin for a friend, went to a tavern for that purpose, and later--while walking from the tavern--were beckoned into Denton's shop. She later left the shop with Denton and went to a tavern for about 45 minutes, and upon their return to the shop Wells left, telling Jordan to wait until he got his car to pick her up.

Defendant at that time was out on the sidewalk in front of the shop, where she had a conversation with Denton concerning money. Thereafter, Jordan agreed to have sex with Denton. Defendant then entered the shop, and Denton closed and locked the door. She went to the rear of the small shop while Denton took money out and threw it on the cot.

Defendant testified that at that point she decided to leave the shop, and when she turned to put on her coat, she heard Denton say, "My God." She turned back and observed Jordan with her pants down. Denton then said, "I don't want any of that," and as he reached over the cot, Jordan took a whiskey bottle which had been sitting near the cot and struck Denton on the head, causing him to bleed and fall to the cot. Defendant then asked her if she knew what she had done, to which she replied, "Find the damn money." Defendant was upset by this demand but, knowing the money was in Denton's coat, she turned to look for it but could not find it. At that time Jordan was straddling Denton, whose shirt was covered with blood, but defendant did not recall seeing her stabbing Denton, although she did see something flash in the dark. Defendant left the shop as Denton was lying on the cot, covered with blood. Jordan caught up with her, and they took a taxi to the Richardson apartment where they went into the apartment washroom and changed their blood-stained clothing. While in the washroom, Jordan removed blood-covered money from her clothing, counted it out, and offered some to defendant, who refused to take it.

Defendant did not tell Officer Merriwether that she "did it"; she was not given a knife that day and had none in her possession. She stated that Jordan stabbed Denton, and she denied telling Officer Merriwether that she killed Denton or that anyone had given her a knife. In early March she telephoned the police to determine whether there was a warrant for her arrest in connection with the incident. The police officer to whom she testified she spoke in that telephone conversation was called in rebuttal and denied having received any such call.

The issue raised by appellate counsel, whether defendant was proven guilty of armed robbery beyond a reasonable doubt, is clearly without merit. The jury heard sufficient evidence, as indicated from the foregoing summary, to reasonably believe that defendant had robbed Denton while armed with a dangerous weapon, in violation of par. 18-2 (Ill. Rev. Stat. 1973, ch. 38, par. 18-2.) Alternatively, even should the jury have believed defendant's account of the crime, that in and of itself established sufficient grounds to find defendant accountable for the armed robbery. As stated in People v. Latham, 17 Ill.App.3d 839, 841, 309 N.E.2d 65, quoting People v. Tillman, 130 Ill.App.2d 743, 265 N.E.2d 904, in order for the State to prove a defendant guilty beyond a reasonable doubt under the accountability theory of par. 5-2 (Ill. Rev. Stat. 1973, ch. 38, par. 5-2(c)), it must establish three propositions:

"* * * (1) That defendants solicited, aided, abetted, agreed or attempted to aid another person in planning or commission of the offenses; (2) that this participation must have taken place either before or during the commission of the offenses; and (3) that it must have been with the concurrent, specific intent to promote or facilitate the commission of the offenses."

Here, according to defendant's own testimony, she aided Jordan in the commission of the offense in joining in the search for the money. This participation took place during the commission of the offense. Finally, the jury could properly conclude that defendant acted with the intent of facilitating the commission of the offense.

Another issue we believe might have been raised is that the sentence of six to 18 years was excessive. At the time of sentencing, defense counsel expressly stated that defendant elected to be sentenced under the statute in effect at the time of the commission of the offense, and defendant also made that request to the court. The sentence for armed robbery at that time was for an indefinite period with a minimum term of two years. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2.) We note, however, that

defendant had been convicted of several felonies in the past and that the victim here died as a result of injuries inflicted in the armed robbery. In addition, it appears that the trial court considered the fact that other judges in the past had attempted to help defendant and that she had violated their trust. Under such circumstances, the sentence being within the limits prescribed by statute, we do not believe there would be any merit to an issue of sentence excessiveness.

The motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is allowed, and the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

(Publish abstract only.)



No. 61453

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
BILLY ROSS,	)	HONORABLE
	)	ROBERT L. MASSEY,
Petitioner-Appellant.	)	PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

Billy Ross, petitioner, appeals from the denial of his amended post-conviction petition filed pursuant to the Illinois Post-Conviction Hearing Act (Ill.Rev.Stat. 1973, ch. 38, par. 122-1 et seq.).

On June 28, 1972, petitioner was convicted upon his plea of guilty of the crime of murder. He was sentenced to a term of fourteen to eighteen years. Petitioner did not appeal that conviction. On June 20, 1973, petitioner filed a pro se post-conviction petition. Counsel was appointed to represent petitioner and an amended post-conviction petition was subsequently filed. That petition alleged that the trial judge in accepting petitioner's plea of guilty failed to comply with the provisions of Supreme Court Rule 402 (Ill.Rev.Stat. 1973, ch. 110A, par. 402), governing pleas of guilty. On November 26, 1974, after reviewing the transcript of petitioner's plea of guilty, the trial judge denied the amended post-conviction petition.

The record reflects that when the petitioner's case was called on June 28, 1972 the Assistant State's Attorney informed the court that petitioner was charged with the crime of murder.

Petitioner's counsel, in petitioner's presence, stated that petitioner wished to withdraw his previously entered plea of not guilty and enter a plea of guilty generally to the indictment. The Assistant State's Attorney informed the trial judge that the indictment charging petitioner contained four counts, but that the State was only seeking a sentence on the charge of murder. The trial judge admonished petitioner that upon a plea of guilty he would waive his constitutional right to have a jury trial. The trial judge explained that at a jury trial, twelve people would be chosen who would determine his guilt or innocence. Petitioner was also admonished that he had the right to confront the witnesses against him and cross-examine the witnesses in the presence of the jury and to present evidence in his own behalf. Petitioner stated that he understood his rights and was willing to give up these rights and that no promises or threats had been made to induce his plea of guilty. The trial judge informed the petitioner that upon a plea of guilty he could be sentenced to an indeterminate term of not less than fourteen years. The facts which provided the basis for the indictment were then stipulated to by the parties. Petitioner persisted in his plea of guilty to the charge of murder which was accepted by the trial court. He was then sentenced to a term of fourteen to eighteen years.

Petitioner's only contention on appeal is that he was entitled to post-conviction relief on the allegation in his amended post-conviction petition that the trial judge, in accepting his plea of guilty, failed to comply with Supreme Court Rule 402 (Ill.Rev.Stat. 1973, ch. 110A, par. 402.). He first argues that the trial judge did not personally inform him as to the nature of the charges. Supreme Court

Rule 402 requires only substantial not literal compliance with its terms. (People v. Mendoza, 48 Ill.2d 371, 270 N.E.2d 30.) In determining whether a defendant understands the nature of the charge, the entire record may be considered and the essentials of the rule have been complied with if an ordinary person in the circumstances of the accused would understand them as conveying the information required by the rule. (People v. Krantz, 58 Ill. 2d 187, 317 N.E.2d 559.) It is not always necessary that the trial judge make personal inquiry of the petitioner to determine whether he understands the nature of the charge. People v. Long, 27 Ill.App.3d 457, 326 N.E.2d 204; People v. Unger, 23 Ill.App. 3d 525, 318 N.E.2d 651.

In the case at bar the record reflects that when petitioner's case was first called, the Assistant State's Attorney stated that petitioner was charged with the crime of murder. Defense counsel informed the trial judge that petitioner wished to enter a plea of guilty to the indictment. The Assistant State's Attorney then stated that while the indictment charged petitioner with four counts, the State was seeking a sentence only on the charge of murder. After petitioner was personally admonished as to his constitutional rights by the trial judge, the facts which provided a basis for the indictment were stipulated to by the parties. The stipulation included a statement that the State's evidence at trial would be sufficient to prove petitioner guilty of the charge of murder beyond a reasonable doubt. A review of the transcript of petitioner's plea of guilty demonstrates that the trial court substantially satisfied the requirements of Supreme Court Rule 402(a)(1) in informing the petitioner and determining that he understood the nature of the only charge upon which he was convicted.

Petitioner also argues that the trial judge did not advise him that he had a right to plead not guilty and to persist in that plea as required by Supreme Court Rule 402(a)(3). The remarks of a trial judge must be read in a practical and realistic manner and if an ordinary person in the circumstances of the accused would understand them as conveying information required by the rule, the essentials of the rule have been complied with. People v. Krantz, 58 Ill. 2d 187, 317 N.E.2d 559; People v. Caldwell, 55 Ill.2d 152, 304 N.E.2d 292.

In the case at bar the record reflects that on June 28, 1972, when petitioner's case was called, petitioner's counsel, in his presence, informed the trial judge that petitioner wished to withdraw his previously entered plea of not guilty and enter a plea of guilty to the indictment. The trial judge advised petitioner of the nature of the charge upon which he was convicted, his right to a trial by jury, his right to be confronted by the witnesses against him and his right to present evidence in his own behalf and that by pleading guilty he would waive each of these rights. Petitioner was admonished as to the possible statutory penalty for the crime of murder. Petitioner stated that he understood each of his rights and that no promises or threats had been made to induce him to enter a plea of guilty. On the basis of all of the admonitions of the trial judge and petitioner's responses, we conclude that there was substantial compliance with Supreme Court Rule 402. See, People v. Davis, 24 Ill.App.3d 758, 321 N.E.2d 382; People v. Montgomery, 22 Ill.App.3d 1075, 318 N.E.2d 86.

The judgment of the circuit court denying the petitioner's amended post-conviction petition is affirmed.

AFFIRMED.



61462

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
vs.)
TONY R. FERGUSON,)
Petitioner-Appellant.)

) Appeal from the
) Circuit Court of
) Cook County
)
) Honorable
) Arthur L. Dunne,
) Judge Presiding.

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION):

BEFORE Barrett, P. J., Lorenz and Sullivan, JJ.

After being charged by indictment with the crime of rape, petitioner, on October 30, 1972, entered a negotiated plea of guilty and was sentenced to a term of 7 to 25 years. He did not appeal that conviction.

On October 11, 1973, he filed a pro se post-conviction petition. Counsel was appointed to represent him and subsequently filed an amended post-conviction petition supported by the affidavits of Mrs. C. A. Ferguson, Clifton A. Ferguson (petitioner's mother and father), and Miss Sandra Ramsbem. The amended petition alleged that his plea of guilty was induced by the promise of his attorney that upon a plea of guilty he would be sentenced to a term of 5 to 10 years. Each of the affidavits stated that they had heard petitioner's counsel make this representation. On October 5, 1974, the trial court denied the State's motion to dismiss the amended post-conviction petition. The court, without hearing testimony, denied petitioner's amended post-conviction petition.

Petitioner appeals arguing that the trial court erred in dismissing his amended post-conviction petition without conducting an evidentiary hearing. The record contradicts petitioner's argument. The Post-Conviction Hearing Act gives the post-conviction judge wide

discretion as to the type of evidence he may receive in the ruling upon the allegations of the petition. (People v. Smith, 45 Ill.2d 91, 256 N.E.2d 800.) The trial court may receive proof by affidavit, deposition, oral testimony or other evidence. (Ill.Rev.Stat. 1973, ch. 38, par. 122-6.) The trial court may properly in its discretion consider affidavits in lieu of oral testimony in determining controverted issues of fact. People v. Kotwaskinski, 11 Ill.App.3d 482, 297 N.E.2d 355; People v. Humphrey, 46 Ill.2d 88, 263 N.E.2d 77; People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285; People v. Cummins, 414 Ill. 308, 111 N.E.2d 307.

In the case at bar, the trial judge denied the State's motion to dismiss. Thereafter, the trial court properly considered the affidavits attached to petitioner's amended post-conviction petition and the transcript of petitioner's plea of guilty. The court then rendered its decision based upon these documents. This procedure was perfectly proper.

Further, even if we were to accept petitioner's argument that his amended petition was dismissed without an evidentiary hearing, the dismissal was proper. The rule is well established that where a post-conviction petition alleges that a plea of guilty was induced by a defense attorney's representation that the defendant would receive a sentence lower than the sentence he actually received, an evidentiary hearing is not required where the allegations are contradicted by the record. People v. Gaines, 48 Ill.2d 191, 268 N.E.2d 426; see also People v. Pineda, 9 Ill.App.3d 1014, 293 N.E.2d 650.

In the case at bar, the transcript of petitioner's negotiated plea of guilty demonstrates that he entered his plea of guilty only after a pre-trial conference with the court. Prior to accepting his plea of guilty, the trial judge in open court informed him that upon a plea of guilty, a sentence of 8 to 21 years would be imposed. He stated that he understood. The trial judge specifically asked if he was willing to accept such a sentence and petitioner responded that he was. After a stipulation of the facts by the attorneys was read into the record, the plea of guilty accepted, the finding of guilty and a hearing in mitigation, the judge sentenced petitioner to a term of not less than 7 years nor more than 25. Petitioner further stated that he wished the proceeds from his bond money turned over to his attorney and that he was satisfied with the work his attorney had done in the case. Petitioner did not at any time during his plea of guilty voice objection to the sentence which was imposed. The transcript of his plea of guilty directly contradicts the assertion made in his amended post-conviction petition that he was promised a sentence of five to ten years. Under these circumstances, the trial court was not obliged to hold an evidentiary hearing.

We, therefore, affirm the order of the circuit court denying petitioner's amended post-conviction petition.

Affirmed.

[PUBLISH ABSTRACT ONLY.]

311.A. 898



No. 60745

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
GARY KING,	)	CHESTER J. STRZALKA,
Defendant-Appellant.	)	JUDGE PRESIDING.

BEFORE DOWNING, P.J., STAMOS, and LEIGHTON, JJ.
PER CURIAM

On September 9, 1973, defendant entered a plea of guilty to the offense of grand theft (auto), in violation of Section 16-1(a)(1) of the Criminal Code, and was placed on probation for a period of 2 years. (Ill. Rev. Stat. 1973, ch. 38, par. 16-1(a)(1).) On May 9, 1974, his probation was revoked on the ground that he had been arrested while operating a stolen automobile during the period of probation, and he was sentenced to a term of 2 years to 5 years.

Defendant contends on appeal that the minimum term imposed must be reduced to one-third the maximum term imposed, in accordance with the Unified Code of Corrections; that he is entitled under the Code to a credit against the sentence imposed for the time that he has served on probation; and that Section 5-8-1(e) of the Code, imposing mandatory parole upon completion of a sentence of incarceration, is unconstitutional.

Evidence was adduced at the hearing on the rule to show cause why probation should not be revoked, that on January 29, 1974, defendant was stopped by the Chicago police for traffic violations while operating an automobile later determined to have been stolen. Defendant denied the theft, testifying that the officers had arrested him on the street and charged him with the theft.

Defendant is correct in his contention that the minimum term imposed upon him must be reduced; the State concedes that the term is excessive. Defendant was found guilty of a Class 3

felony, which carries a penalty of one year to 10 years, the minimum term of which cannot exceed one-third the maximum term imposed. (Ill. Rev. Stat. 1973, ch. 38, pars. 16-1(e)(2), 1005-8-1(b)(4), 1005-8-1(c)(4).) The 2-year minimum term imposed upon defendant must therefore be reduced to one-third of the maximum 5-year term imposed, or 20 months.

Defendant is also entitled to a credit against the sentence for the time which he has served on probation. At the time of defendant's sentencing on May 9, 1974, the Unified Code of Corrections extended to a probationer the absolute right to have such time credited against a subsequent sentence of imprisonment. (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-6-4(h).) Public Act 78-939, cited by the State as having amended that subsection to render the extension of such credit discretionary with the trial court, was not effective at the time of the instant sentencing but took effect on July 1, 1974. (See Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(h); People v. Robinson, 20 Ill. App. 3d 152, 313 N.E.2d 213, leave to appeal denied 56 Ill. 2d 590.) Although both versions of Section 5-6-4(h) have been in effect prior to the final adjudication of this matter, defendant is entitled to the "more favorable intervening statute," the version providing for the absolute right to such credit rather than application of such credit at the discretion of the trial court. People v. Williams, 60 Ill. 2d 1, 322 N.E.2d 819; but see People v. Johnson, 25 Ill. App. 3d 503, 323 N.E.2d 539.

Finally, defendant for the first time on this appeal raises the argument that the mandatory parole term imposed by Section 5-8-1(e) of the Unified Code of Corrections is unconstitutional on the grounds that it violates procedural due process and the doctrine of separation of powers. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(e).) He is therefore barred from raising such question on this appeal. See People v. Nero, ___ Ill. App. 3d ___, ___ N.E.2d ___ (#60414, June 17, 1975);

People v. Eubank, 46 Ill. 2d 383, 263 N.E.2d 869; People v. Cooper, 17 Ill. App. 3d 934, 308 N.E.2d 815.

The judgment of the circuit court of Cook County is accordingly affirmed, and the cause is remanded with directions to issue an amended mittimus reflecting a reduction to 20 months in the minimum term of sentence imposed upon defendant and also reflecting application of a credit against his sentence for the time which he has served on probation.

Judgment affirmed and
Cause remanded with directions.

(Publish abstract only.)



No. 60872



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
ANDREW BROOKS,	)	JOSEPH A. POWER,
Petitioner-Appellant.	)	JUDGE PRESIDING.

BEFORE DOWNING, P.J., STAMOS, and LEIGHTON, JJ.

PER CURIAM

Petitioner Andrew Brooks was found guilty after a jury trial of the offenses of murder and armed robbery, and sentenced to concurrent terms of 30 years to 70 years on the murder conviction and 10 years to 30 years on the armed robbery conviction; that judgment was affirmed on direct appeal to the Illinois Supreme Court in People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326. Petitioner's subsequently filed supplemental petition for relief under the Illinois Post-Conviction Hearing Act was dismissed on motion of the State without an evidentiary hearing and he appeals. (Ill. Rev. Stat. 1973, ch. 38, pars. 122-1 et seq.) Petitioner's sole contention on this appeal is that his appointed counsel in these proceedings was ineffective in that he failed to raise in the supplemental petition the alleged fact that his convictions arose out of a single course of conduct.

Petitioner and several other youths were found guilty of the murder and armed robbery of an insurance man. Subsequent to the affirmance of the convictions by the Illinois Supreme Court, petitioner filed a pro se post-conviction petition generally alleging a denial of his constitutional rights at the trial. A supplemental petition was filed by appointed counsel, raising two of the issues which had been raised and disposed of in the direct appeal.^{1/} Counsel also filed with the trial court a certificate of counsel pursuant to Supreme Court Rule 651(c) (Ill. Rev. Stat. 1973, ch. 110A, par. 651(c)), stating that he had on numerous occasions conferred with petitioner by mail

^{1/} The two issues were the questions of severance and the admissibility of a certain conversation overheard by the police.

and in person, and that he had reviewed the report of proceedings from the trial of the case. Petitioner's counsel argued at the hearing on the State's motion to dismiss the petition that the matters raised in the supplemental petition were raised on the basis of the fundamental fairness doctrine.

Petitioner's claim on this appeal that his counsel in the post-conviction proceedings was ineffective in that he failed to raise the question of his convictions having allegedly stemmed from a single course of conduct is based upon the language in the supreme court's affirmance of the convictions on the direct appeal, that:

"As the [petitioner and the other youths] left the apartment with the rifle they saw an insurance man in the lobby of the apartment building. They decided to rob him. While doing so [one of the youths] shot the insurance man who died from his wound. The boys took \$35 from his pocket and fled * * *." (51 Ill. 2d at 158.)

The language taken from the supreme court opinion is a summary of a portion of the evidence adduced at the trial. Petitioner's counsel in the post-conviction proceedings certified to the court that he had reviewed the report of proceedings; he was therefore in a better position than this court to have determined whether the instant offenses arose out of the same conduct since we do not have that report of proceedings before us. The supplemental petition was filed subsequent to the case of People v. Lilly, 56 Ill. 2d 493, 309 N.E.2d 1, establishing that a single criminal act could support only a single conviction, and subsequent to the case of People v. McDonald, 15 Ill. App. 3d 620, 305 N.E.2d 69, holding that an accused could be found guilty of both murder and armed robbery under circumstances appearing to be similar to the instant situation. It is therefore reasonable to infer that counsel considered the report of proceedings in light of those cases and concluded that raising such issue in the supplemental petition would be without merit. From the record now before the court it cannot be said that petitioner's counsel in the post-conviction proceedings was

ineffective for failing to raise the instant question in the supplemental petition. See also People v. Williams, 60 Ill. 2d 1, 14-15, 322 N.E.2d 819.

For these reasons the order of the circuit court of Cook County dismissing the post-conviction petition without an evidentiary hearing is affirmed.

Order affirmed.

(Publish abstract only.)







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